

Investigation into Certain Matters in Kildare and Wicklow Education and Training Board

Report Prepared by Dr. Richard Thorn, 4th February, 2018

Technical Clarifications submitted on 1st March, 2018

FINAL Report, following right of reply, submitted on 4th July, 2018

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1. Background and Layout of Report

1.1 Comptroller and Auditor General Audit

In the course of the Audit by the Comptroller & Auditor General (the 'C&AG' hereafter) of the Kildare and Wicklow Education and Training Board's (the 'KWETB' hereafter) financial statements for 2015 the C&AG raised queries directly with the KWETB and then brought a number of issues to the attention of the Department of Education and Skills (the 'Department' hereafter). The Department corresponded with KWETB and sought responses to the issues concerned.

1.2 Investigation Under Section 40 of the Education and Training Board Act, 2013¹

Having considered the issues raised by the C&AG and the subsequent correspondence between the Department and the KWETB, in exercise of his power under Section 40 of the Education and Training Board, Act 2013, the Minister for Education and Skills (the 'Minister' hereafter) appointed Dr. Richard Thorn, President Emeritus of the Institute of Technology, Sligo to carry out an investigation (the 'Investigator' hereafter). The investigation was to consider the performance by the Board of its functions particularly, in relation to public procurement, usage and disposal of assets and propriety and other matters, to submit a Draft report to the Board and Final report to the Minister as soon as was practicable after the Board had considered and responded to the Draft report.

1.3 Layout of Report

The Report consists of ten sections, including this Background, plus two Appendices. An Acknowledgements section is followed by a section dealing with the Conduct of the Investigation. Sections 4 to 9 deal with specific matters identified for investigation in the original Terms of Reference, plus an additional matter included during the course of the investigation (see below). In each of these sections a short Narrative is followed by a Finding(s) and, where necessary, a Recommendation(s). Section 10 is a Summary of Findings and Recommendations. Appendices One and Two reproduce section 40 of the Education and Training Board Act and the Terms of Reference respectively. Appendix Three is the response of the Board of the KWETB.

During the course of the investigation a matter was brought to the attention of the Investigator that was considered to be relevant to the investigation. The matter is included under Term of Reference 2 b) and is dealt with in conjunction with Term of Reference 1 a) ix in this Report.

¹ The full Act may be found at <http://www.irishstatutebook.ie/eli/2013/act/11/enacted/en/html>. Section 40 is included in full in Appendix One.

1.4 Sub Judice Matters

This investigator has been informed that some of the matters considered by it may be the subject of legal proceedings. This Investigator is a stranger to all such proceedings and unaware of their precise subject matter and status. However, the Investigator is cognisant of the need to avoid any act or omission that would amount to a contempt of court in relation to matters that are *sub judice*. If, and to the extent therefore that this Report is circulated beyond the Department of Education and Skills or the Kildare Wicklow Education and Training Board, then consideration should be given to the redaction of sections of this Report the publication or circulation of which might infringe the *sub judice* rule.

1.5 Background Notes

Kildare and Wicklow Education and Training Board was formed on 1st July, 2013. Prior to this the Board consisted of Kildare and Wicklow Vocational Education Committees. In 2017 the Board had a recurrent budget of c. 129 million EUR including 17 million EUR capital. The staff headcount was c. 2,500 and the Board catered for just under 30,000 post primary and further education and training beneficiaries².

During the course of the investigation it became clear to the Investigator that the establishment of the Board in 2013 and its immediate aftermath was characterised by challenging circumstances with new Board and Executive structures to be accommodated and developed, different organisational cultures to be aligned and straitened financial circumstances to be overcome. It is also recognised that this VEC is located in one of the fastest growing areas of education demand in Ireland which poses significant challenges to the Board in meeting its education mission. It is clear that while new staffing arrangements, particularly at Director level, are helping the organisation to meet its educational objectives, challenges remain.

² Figures supplied by the KWETB

1.6 Investigator Statement

During the period that the investigation was being undertaken the author of the Report, Dr. Richard Thorn, was engaged as a Subject Matter Expert by Prospectus, a consulting company, which had been engaged to undertake a Mid Term Review of the SOLAS strategic plan. The investigator disclosed this matter to officials of the Department and to all relevant persons during the course of the Mid Term Review. At no stage was there overlap of this investigation with the Investigator's work on behalf of Prospectus.

The author of the report has no other connection, current or historic, with KWETB.

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2. Acknowledgements

The Investigator gratefully acknowledges the support provided by the Department of Education and Skills to the investigation. In particular, the Investigator wishes to thank Geraldine Kennedy, who provided administrative assistance to the investigation.

The Investigator wishes to thank members of the Executive of KWETB, in particular Joe Kelly and Mary Dillon, who assembled the large amount of information required for consideration, who answered queries and who provided working space within the KWETB offices in Naas. The Investigator is grateful to Mr. Michael Lanigan of Poe Kiely Hogan Lanigan Solicitors, legal advisors to the Board in respect of the investigation, for his helping to establish a constructive working relationship which enabled the efficient running of the investigation. The Investigator also wishes to acknowledge the many people in KWETB, and associated with KWETB, who assisted the investigation by providing information and/or who attended for interview.

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3. Conduct of Investigation

3.1 Commencement and Submission

The Terms of Reference for this statutory investigation were announced on 4th October, 2017. The investigation commenced on 20th October, 2017. In accordance with the Education and Training Board Act, 2013, Section 40 (the 'Act' hereafter) a Draft was submitted to KWETB on 2nd January, 2018. The Board responded within the calendar month specified in the Act. The full response of the Board is included, as received, at Appendix Three. The Investigator considered the Board's response and made a very small number of minor technical adjustments to the Report – these did not include any changes to findings or recommendations. Beyond noting the comprehensive nature of the response and, in the opinion of the Investigator, the constructive approach to dealing with the Recommendations no observations are made on the Board's response. The report was forwarded to the Department on the 2nd February and, following a request to clarify a number of technical matters, was resubmitted on 1st March, 2018. Following the provision of a right to reply to certain individuals, the FINAL report was submitted to the department of education and Skills on 4th July, 2018.

3.2 Contacts and Meetings

The Investigator was contacted confidentially by four individuals who wished to provide information. These individuals were met and documentation provided by them was accepted and considered.

In addition to the individuals referred to in the paragraph above, thirteen individuals were met during the course of the investigation. These included the Chief Executive (the 'CE' hereafter) of KWETB during the period being considered and the Chair and Vice Chairpersons, who were also the Chair and Vice Chairpersons of the KWETB (the 'Chairperson' and 'Vice Chairperson'³ hereafter) during 2015, prior to their resignation in December, 2017. The Investigator also met the current Chairperson. Two other individuals provided written submissions, upon request, to the Investigator.

3.3 Approach to Investigation

The Department provided a set of files to the investigation that included queries and responses to the C&AG and the Department. In addition, the KWETB provided a comprehensive range of documentation, as requested, during the course of the investigation. These documents formed one component of the investigation.

³ The current Chairperson and Vice Chairperson were, respectively, the Vice Chairperson and Chairperson during 2015.

A second source of information available to the investigation was information made available during the course of meetings or correspondence with persons of interest to the investigation. At an early stage in the process, the legal advisor to the Board of the ETB on matters associated with this investigation, Mr. Michael Lanigan of Poe Kiely Hogan Lanigan Solicitors, was met and a protocol was agreed for meeting with the persons of interest to the investigation. This protocol included, but was not restricted to, Mr. Lanigan being available in advance of and during the meetings to persons the investigation wished to meet. An addition to the Protocol during the period when the Board was considering its Draft responses was that all matters that members wished the Final report to consider were to be transmitted through the Chairperson for the Board as a whole to consider.

A third source of information was written and oral communication with persons of interest to the investigation who were not employees of the KWETB.

Where individuals were met, a note of each meeting was prepared. Where, subsequently, it was decided to use information from these meetings, the relevant section of the Draft was sent to the individual for verification.

In accord with the format adopted in the Terms of Reference whereby individuals, companies and schools were not named, so to in this report. Individuals have been assigned a letter (A, B, C etc) and companies and schools have been assigned a numeral (1, 2, 3 etc).

In June, 2018, following consultation with, and a request from, the Department of Education and Skills a right of reply was offered to the CE and to Company 3. The CE responded by the deadline required. Company 3, sought and received a short extension to the deadline, but by the extended deadline no submission had been received.

4. Terms of Reference 1 a) i, ii and iii

4.1 Introduction

Terms of Reference 1 a), i, ii, and iii are concerned with procurement and are, for the purposes of this Report, grouped together. The relevant Terms of Reference with the preceding statement of requirements are:

'To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matters:

- *Compliance with Department procedures in relation to the procurement and delivery of various building projects*
- *The governance arrangements in relation to procurement matters in 2015, 2016 and to date in 2017*
- *The effectiveness of arrangements put in place, in the years 2015, 2016 and to date in 2017, by the delegation of functions or otherwise to ensure a conflict of interest did not occur with particular regard to procurement, asset disposal or leasing that concerned companies referred to in the C&AG Audit'*

4.2 1 a) i - Narrative

'Compliance with Department procedures in relation to the procurement and delivery of various building projects'

A range of EU Directives, national requirements, Department requirements - as expressed through guidelines - codes of practice and established practices cover procurement and the interaction between employer/client, Employer Representative on building projects and building contractors, as considered in this report. In all cases where the Investigator has made a finding in respect of a procurement action or an action in respect of a building project he has referenced the/a particular document that covers the matter.

The matters covered by this Term of Reference comprehend minor building works, as *per* Term of Reference 1 a) iv a contract for heating and plumbing services, as *per* Term of Reference 1 a) viii, an acceleration of a school building project as *per* Term of Reference 1 a) ix, the employment of a consultant on a school building project as *per* term of reference 1 a) x, and a school building project as *per* Term of Reference 2, b).

The Investigation has considered each of these matters in sections following in this report and findings are summarised here. Recommendations specific to the findings at 4.3 are dealt with in the relevant sections in the report.

4.3 1 a) i – Findings

- **Term of Reference 1 a) iv – There are several inconsistencies surrounding the procurement of the minor building works that are beyond the powers of the investigator to reconcile and this matter has been referred to the Garda Economic Crime Bureau.**
- **Term of Reference 1 a) viii – A contract for heating and plumbing services for a summer works scheme did not breach Department procurement requirements but the process was suboptimal. In respect of a tender for a drawdown contract, the tender evaluation process appears flawed.**
- **Term of Reference 1 a) ix – The acceleration ('in effect' - as found by a Conciliator) of a school building project was not in accord with Department contract management guidelines.**
- **Term of Reference 1 a) x – The procurement of a mediator by the CE for a school building project did not accord with procurement guidelines. The mediator's appointment did not appear to meet the contract requirements for dispute resolution.**
- **Term of Reference 2 b) – The intervention by the CE in the final account agreement process was not in accord with Department contract management guidelines.**

4.4 1 a) ii - Narrative

'The governance arrangements in relation to procurement matters in 2015, 2016 and to date in 2017'

The governance arrangements for procurement are addressed by having a suite of policies in place that cover the ethical and technical aspects of procurement that in turn deal with conflict of interest and procedural matters. Further, these policies and procedures are embedded through training, ensuring that disclosures of interest and any conflicts of interest are established and having the necessary structures (e.g. an Audit and Risk Committee) in place to support the work of the Board.

The Board of KWETB approved a procurement policy at its meeting on January 5th, 2015. The policy, developed internally and based on relevant national and EU requirements, remains in force to the present.

On 16th March, 2015 the Board received a briefing from the CE on the Code of Practice for the Governance of Education and Training Boards and this was adopted on 12th May, 2015.

Undated Codes of Conduct for Board members and staff, that cover conflicts of interest, disclosures of interest and requirements to abide by procurement requirements, are in existence. It has been confirmed to the Investigator that these were considered as part of the Code of Practice briefing referred to in the previous paragraph.

Finance and Audit Committees were established at the Board meeting of 12th May, 2015. The Audit Committee is an important part of the Governance framework for an organisation. This Investigator has been informed that, in practice, the structure of the Audit Committee is not fit for purpose. Three reasons are advanced. First, it has no control over the matters it wishes to have audited – these being determined by the Department of Education and Skills Internal Audit Unit (IAU) – even though it may have identified matters germane to the functioning of the ETB and have submitted these issues in writing to the IAU for the ETB's for inclusion in their annual audit plan. Second, the meetings are restricted to four per year - a number not sufficient to undertake the business required of the Committee. Third, membership and attendance requirements mean that meetings have been inquorate and/or problematic to organise thus furthering the difficulty of the Committee meeting its obligations to the Board.

It is this Investigator's understanding that the challenges faced by Audit Committee may not be unique to this ETB.

The requirements of the Standards in Public Office legislation have been met through the submission of disclosure of interest forms. However, the Board has no procedures to manage real or perceived conflicts of interest other than through the Codes of Conduct.

4.5 1 a) ii – Finding

- **Effective governance of procurement requires that a range of policies, procedures and structures be in place to give effect to a robust and transparent system of procurement. In general, the main components of a robust and transparent procurement framework are in place in the KWETB. While there are gaps, which are addressed in the recommendations in section 4.6, they, of themselves, do not explain the failures, noted elsewhere in this report, to meet the procurement requirements approved by the KWETB.**

4.6 1 a) ii – Recommendations

- **The Board of KWETB, utilising the services of an external agency, should develop a checklist of policies and procedures covering procurement, and**

any related matters, to include their version control, promulgation and sign off by Board members and members of the Executive.

- The Board of KWETB, utilising the services of an external agency, should develop and approve a policy and procedures for managing real or perceived conflicts of interest at Board or Executive level.
- The Board of KWETB, utilising the services of an external agency, should review the arrangements for the functioning of the Audit Committee to ensure its effectiveness and make adjustments as required.
- The Board of KWETB should take an active, rather than passive, role in ensuring that there is effective oversight of governance arrangements within the KWETB.

4.7 1 a) iii - Narrative

'The effectiveness of arrangements put in place, in the years 2015, 2016 and to date in 2017, by the delegation of functions or otherwise to ensure a conflict of interest did not occur with particular regard to procurement, asset disposal or leasing that concerned companies referred to in the C&AG Audit'

In respect of the CE's role in procurement, Section 16 of the Education and Training Board Act of 2013 provides for a Chief Executive to delegate functions. Such a facility provides a mechanism for the CE to distance themselves from matters, particularly those dealing with procurement, that might constitute a conflict of interest. The CE has noted in correspondence with the Department of Education and Skills (4th September, 2017) that the use of a digital signature on procurement documentation was a legacy issue and should not have happened after the delegation of authority in the ETB's new corporate structure. The Investigator draws the inference (confirmed by the CE) that procurement matters were to be the responsibility of a Chief Operating Officer (COO) in the new corporate structure. Documents detailing these new operating structures, with one noting them to come into effect from the 1st July, 2013, were made available to the Investigator. The documents provide for the COO to take over responsibility for a wide range of functions hitherto the responsibility of the CE. The Minutes of the Board meeting of 10th November, 2015 note the CE briefing the Board on changes to the staff structure and the assignation of staff duties. It should be noted that there is no specific reference to the COO taking over responsibility for procurement in either the document referred to above or from the minutes of the Board meeting. The Chair and Vice Chairpersons do not recall the CE at this meeting specifically delegating responsibility for procurement. The then COO has confirmed that at no stage was he assigned responsibility for procurement matters.

The Report has noted (section 4.5) that, in general, the main components of a robust and transparent procurement framework are in place in the KWETB. The Investigator does not believe that the absence of a policy and procedure for the management of conflict of interest can explain the failures in respect of governance of procurement described in the following sections; the procurement guidelines, the code of practice for governance of education and training boards and the codes of conduct, if adhered to, provide a satisfactory ethical and technical framework for the governance of procurement.

4.8 1 a) iii – Finding

- **If adhered to, the procurement governance arrangements in place in 2015, 2016 and 2017 were sufficient to ensure conflicts of interest did not arise in procurement matters. There is disagreement on whether or not the procurement function was delegated.**

4.9 1 a) iii – Recommendations

- **Any functions delegated under Section 16 of the Act should be clearly and unambiguously laid out in a document prepared by the CE and tabled at the Board.**
- **The Board of KWETB should take an active, rather than passive, role in ensuring that there is effective oversight of governance arrangements within the KWETB.**

5. Terms of Reference 1 a) iv and v

5.1 Introduction

Terms of Reference 1 a) iv and v are concerned with a rental property and are grouped together for the purposes of this report. The relevant Terms of Reference with the preceding statement of requirements are:

'To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matters:

- *The access to and usage of an ETB rented property by a company referred to in the C&AG Audit, the origin of this arrangement, the agreements reached, the conditions attached including rent level, payments in respect of works carried out, the timeliness of invoicing for rent and utilities due and receipt of same*
- *The business case for the ETB's intended use of the rented property and any impact of its unavailability for this intended use'*

5.2 1 a) iv - Narrative

'The access to and usage of an ETB rented property by a company referred to in the C&AG Audit, the origin of this arrangement, the agreements reached, the conditions attached including rent level, payments in respect of works carried out, the timeliness of invoicing for rent and utilities due and receipt of same'

The background and business decision making process to the selection of a property for training is dealt with in 5.5 below. This section is concerned with the rental and remediation arrangements of the property by Company 1⁴. It should be noted that Company 1 was connected through a family member to the CE of KWETB.

The CE, in an undated 'Aide Memoir' on the KWETB files on acquiring a property in Naas for training, notes that the search for a suitable premises revealed rental rates – established by phone – for two properties of 80k and 50k. The property at 50k was selected and rent subsequently negotiated down to 40k. A licence for the use of the property was signed on 29th June, 2015.

⁴ It should be noted that Company 1 is a business name owned by Company 2. Company 2 was named in many of the emails relating to the property.

The property had been used as a dog food factory and required some remedial works prior to occupation and conversion to a training facility.

In the same aide memoir noted previously the CE notes that he requested Company 1 to carry out a range of works to make the property safe including electrical works, air conditioning and cleaning. In response to a query on the use of the property by Company 1 from the Department on 4th September, 2017 the CE states that 'Company 2' were carrying out works for the ETB elsewhere at the time and were asked to make the property safe and that in lieu of the costs of the works they would use two offices. It should be noted that there is no suggestion in the CE's communication with the Department, nor in any of the contemporaneous documentation, that a tender process was used to select Company 1. Subsequently, Company 1 occupied a portion of the building in return for a rent waiver against the work undertaken. A senior staff member from the ETB has confirmed to the Investigator that it was always understood that the cost of the remedial works would be offset against the rent. The rent waiver agreement was subsequently withdrawn for tax reasons and Company 1 was required to pay the rent separately. An invoice for 8,519.12 EUR (rent - 6666.70, telephone charges - 882.00 and electricity charges - 970.42) was issued on 21st July, 2017 for a ten-month occupation from August 2015 to May 2016. On 30th August, 2017 a sum of 6,000 EUR was paid in partial payment of the invoice. It is understood that Company 1 is no longer trading.

Regarding the cost of works carried out, three invoices totalling 32,025 EUR were supplied to the investigator. These are dated 19/1/2016 (19,100 EUR), 3/2/2016 (7,800 EUR) and 4/2/2016 (5,125 EUR).

Between June and November 2017, the ETB was given the opportunity to provide documentation associated with the rent and refurbishment of the property (first by the C&AG, on two occasions by the Department and on two occasions by the Investigator). During the course of interview, the CE was also offered the opportunity to provide information on tendering of the remedial works – none was forthcoming. The protocol for the conduct of the Investigation provided for individuals to receive section(s) of the narrative that drew from their evidence to the Investigator. In this regard the CE received an extract noting that no documentary evidence had been provided of tendering the remedial works. On 19th December, shortly before the deadline for a response, the Investigator received an email with an attached Tender Report for the tendering of the remedial works. The Tender report had been prepared by Company 3 (see below) and was dated 15th December, 2015. A separate email from Company 3 to the KWETB with some back up documentation was also sent on the 19th December.

5.3 1 a) iv - Finding

- **The Investigator finds several inconsistencies in the narrative noted above:-**
 - 1. The CE has stated in correspondence and in an aide memoir that Company 1 was requested to make the property safe in return for a rent waiver. There is no contemporaneous documentary or oral confirmation from other than the CE, other than the Tender Report and documentation produced on the 19th December, 2017 that tendering took place.**
 - 2. In Section 4.7 the CE asserts that there was delegation of the procurement function from mid-2013. That being the case, it is not clear why other staff within the ETB were not aware of a tendering process in respect of this project at that time. It should also be noted that the COO maintains that procurement was not delegated to him.**
 - 3. The Tender Report is dated 15th December, 2015. The first invoice is dated 8th January, 2016. Given the intervening Christmas period this appears to be a very short period of time to allow response to the successful tenderer, for that contractor to mobilise on site and for the work to be undertaken.**
 - 4. The fact that an invoice for rent and utilities to cover a period of occupation prior to the date of the tender report was issued in July 2017 supports the CE's original assertion that Company 1 was requested to undertake remedial works in return for a rent waiver and was thus already in occupation of the building prior to the date of the tender report.**
 - 5. With the exception of the tender report and documentation received shortly before the deadline for response, there is no evidence that a tender process took place. The Investigator cannot make a finding as to the authenticity of the tender process disclosed at a very late stage in the investigation.**
 - 6. The CE, in an email, states that the work for the 19,100 EUR invoice noted above was tendered but the additional work was not.**

5.4 1 a) iv – Recommendation/Action

- **In the absence of the establishment of the authenticity of the tender report and documentation, the Investigator cannot make a finding as to whether an acceptable procurement process for the remedial works took place. Determination of the authenticity of the tender report and documentation reconciliation of the inconsistencies requires investigative powers beyond the scope of this Investigation and the matter has been forwarded to the Garda National Economic Crime Bureau**

5.5 1 a) v – Narrative

'The business case for the ETB's intended use of the rented property and any impact of its unavailability for this intended use'

In early 2014 KWETB submitted a service plan to SOLAS that identified a lack of capital resources necessary to discharge its training function. In late 2014 the ETB established a project timeline for the implementation of the service plan for 2015. At this point training had not been formally transferred to KWETB from SOLAS but it was anticipated that this would happen in 2015. During 2015 a search for suitable properties was initiated. A property at Naas Business Park was identified as being potentially suitable. A licence for the use of the property was signed on 29th June 2015.

The property, which had been used for the manufacture of dogfood, required preparatory work prior to conversion to a training facility. Between late 2015 and September 2016 the property was occupied by Company 1 (see above). During this period Company 1 undertook remedial works on the property.

At the meeting of the Board in August 2016 the CE presented a list of properties he proposed to lease, including that at Naas Business Park, the minutes of the meeting do not record formal approval for any of the leases proposed by the CE. The Code of Practice for the Governance of Education and Training Boards notes that 'the acquisition, development and disposal of land, including buildings, or any interest in land, including buildings' requires approval by the Board. It has been confirmed to the Investigator by the person taking the minutes that the leases were in fact approved but not recorded in a sufficiently clear fashion.

In September 2016 a warehouse training course commenced in the property. In October 2016 SOLAS recommended to the Department that a lease be entered into for the property and that the rent proposed was reasonable provided that the building required no major repairs. In January 2017 SOLAS visited the property to see if the building was suitable for the training of electricians. The report of the visit - issued in February 2017 - noted it was suitable.

5.6 1 a) v – Findings

- **There was a demand for training in the KWETB. This demand was articulated in a service plan submitted to SOLAS. The ETB made the necessary planning arrangements to ensure that training could commence in a timely manner. The occupation of the property designated for training provision by Company 1 between late 2015 and 2016 did not hinder the use of the property for any planned training activity.**

5.7 1 a) v – Recommendation

- **Notwithstanding the urgency of a requirement to establish education and training provision in any location, the Executive and Board members of the Kildare and Wicklow Education and Training Board should ensure that the requirements of the Code of Practice for the Governance of Education and Training Boards in respect of Board approval for ‘the acquisition, development and disposal of land, including buildings, or any interest in land, including buildings’ are adhered to.**

6. Terms of Reference 1 a) vi and vii

6.1 Introduction

Terms of Reference 1 a) vi and vii are concerned with motor vehicles and are grouped together for the purposes of this report. The relevant Terms of Reference with the preceding statement of requirements are:

'To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matters:

- *The operation and use of pool vehicles and business case for same*
- *The sale of a motor vehicle and the timelines in relation to the decision to dispose of the vehicle, the assessment of its value, the date of sale, the supporting documentation in relation to the sale and the timeliness of receipt of the proceeds of same by the ETB'*

6.2 1 a) vi - Narrative

'The operation and use of pool vehicles and business case for same'.

KWETB owns and operates a number of vehicles. The insurance schedule for the period under investigation shows ten vehicles (excluding lawnmowers) insured by Irish Public Bodies. Many of these vehicles are linked to Outdoor Education Centres and are used for the transport of attendees at these centres to and from activity sites. The CE has confirmed to the Investigator that as part of the cost management process a decision was taken to purchase vehicles for staff use so as to reduce travel expenses. In interview, the CE asserted that a business case for the purchase of vehicles had been previously prepared. During the course of the Investigation a document titled 'Travel Costs/Expenditure for KWETB' was provided. The document, which was undated, provides an analysis of the likely savings from using car pool vehicles for the transport of KWETB staff instead of own vehicles. The Investigator understands that this document may have been prepared prior to the merger between Kildare and Wicklow VECs.

The use of 'car pool' vehicles is covered by Revenue advice⁵; 'A car-pool is where the car is available and used by more than one employee. The car must not be kept overnight at or near the home of any of your employees.' A normal procedure to ensure that no benefit in kind accrues to a staff member through the use of a car pool vehicle for private use, is to maintain a vehicle log. Vehicle key

⁵ <https://www.revenue.ie/en/employing-people/benefit-in-kind-for-employers/private-use-of-company-cars/categories-of-car-use.aspx>

logs covering the period from 2014 to the present were provided to the investigation. The logs record vehicle details and the date and time each is logged out and logged in to its base.

6.3 1 a) vi – Finding

- **A business case for the use of car pool vehicles was provided to the Investigation. A vehicle log covering the period 2014 to the present is in existence.**

6.4 1 a) vii – Recommendation

- **The business case for maintaining a collection of car pool vehicles should be reviewed to ensure currency and the procedure for recording vehicle use examined to ensure that it meets standards required to ensure no BIK obligations accrue.**

6.5 1 a) vii - Narrative

'The sale of a motor vehicle and the timelines in relation to the decision to dispose of the vehicle, the assessment of its value, the date of sale, the supporting documentation in relation to the sale and the timeliness of receipt of the proceeds of same by the ETB'.

On 4th January, 2016 a van was purchased by KWETB. The insurance schedule for the period shows the van valued at 12,715 EUR. On 14th December, 2016 the CE received a letter from a KWETB staff member, who had been using the vehicle, reporting numerous faults and advising replacement rather than repair. The CE decided to sell the van. During January 2017 the KWETB received two valuations for 5,500 and 5,250 EUR respectively. It has been suggested to the Investigator that the cost of repair would have run to c. 4,000 EUR which would give a depreciation of approximately 4,000 EUR between the time of purchase and the sale. While the sale price matches the market value for the van, the purchase price a year earlier appears excessive given the subsequent condition of the van.

The CE's response to the report notes that the insurance valuation showing 12,715 EUR should have been adjusted downwards by the ETB thus reducing the apparent over valuation of the vehicle.

On 29th January, 2017 a member of staff received a request from the CE to release the vehicle license certificate to another member of staff. A letter dated 25th August, 2017 notes that a representative of an auction room confirmed a sale date of 19th January, 2017. The sales invoice for the van, for 5,500 EUR, is dated 19th June, 2017. The Investigator was informed that the discrepancy arose from the

fact that a) the sale proceeds were being held by the auction house to be set against other items that had been purchased by the KWETB⁶ and b) the finance system in operation in the auction house could not backdate the sale date.

6.6 1 a) vii – Finding

- **The documentation provided by KWETB shows a logical sequence of events leading to the sale of the van. The delay in receipt of sale proceeds is explained, but the offset of proceeds against the purchase of other items at auction cannot be regarded as good financial management. The difference between the purchase price, as reflected in the insurance valuation, and the sale price does not represent a good value transaction.**

6.7 1 a) vii – Recommendation

- **The practice of offsetting sales proceeds against items purchased, as here, and as initially proposed at section 5 above, is not a good practice and should cease. Future purchases of motor vehicles should be from reputable dealers willing to provide guarantees.**

⁶ The material provided to the Investigator contains a list of items purchased at auction by the ETB from the auction house on 3rd June, 2017. The value of the items listed is 3,682.83 EUR.

7. Term of Reference 1 a) viii

7.1 Introduction

The relevant Term of Reference with the preceding statement of requirements is:

'To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matter[s]:

- *The tender assessment process in relation to a drawdown contract awarded to a company referred to in the C&AG Audit'*

7.2 1 a) viii – Narrative

'The tender assessment process in relation to a drawdown contract awarded to a company referred to in the C&AG Audit'

Correspondence between the C and AG and the KWETB referenced a number of heating and boiler and plant maintenance contracts. The Investigator considered that two contracts dealing with a Summer Works Scheme and a Boiler and Plant Maintenance Contract should be considered under this heading.

The first contract considered was a contract for a summer works scheme. On 19th March, 2014, the Department approved an application by KWETB for boiler replacement works at School 1 as part of the Summer Works Scheme; the amount approved was 318,000 EUR to include VAT and fees. The works were to include a new gas fired heating plant and radiators and pipework throughout the school. Following approval, the KWETB invited applications for a Building Services Consulting Engineer in early April. A tender from Company 3 was accepted on 12th May, 2014.

On 16th June, 2014 a contract notice for the works was posted to the eTenders website with a response deadline of 24th June, 2014 – 5.5 working days. Only one company responded – Company 1, noted previously in this Report – whose tender was within the amount approved by the Department. A contract with Company 1 was signed on 18th July, 2014.

The Department's technical guidance on small building projects, in operation at the time, notes that for projects of this value a minimum period of 15 days should be allowed for prospective tenderers to respond. An exception may be made in emergency cases.⁷ The schedule for the works, in respect of the 'Time for

⁷ Department of Education and Skills (2014) Technical Guidance Document TGD-007. Design Team Procedures for Small Works

Completion', notes a time requirement of '60 days starting from 14th July 2014. All works to be completed by the 22nd August 2014'. There are contradictions in this statement; 60 days would bring project completion to mid-September; the contract was signed on 18th July and not 14th July. A representative of Company 3 has confirmed that the inclusion within the 'Time for Completion' requirement of '60 days' was a mistake and that the critical date was the completion date – to allow for reopening of the school. Given that the works involved the replacement of piping and radiators in classrooms then completion by the last week in August was required. Thus, a shortened time for response to the tender request may have been justified but was suboptimal given the Department guidelines on tender processes. It is a fact that there was a tender response time of 5.5 days and the sole and successful tenderer was a company related to the CE through a family member.

The second contract was a drawdown contract for boiler and plant maintenance of KWETB schools, colleges and various education centres. The tender for this contract was issued in June 2015 and covered the 2015 to 2017 period. Company 3 assessed the eleven tenders that were submitted by the appointed date and time. Company 1 was deemed to have won the tender.

The Investigator has examined the material on file for this tender⁸. This material included the original tender submissions from the companies. Company 1 was awarded the highest marks possible in each category, except price. These categories included company structure, CVs for contract manager and service technician, marks for similar projects, transport fleet, technical equipment and after sales service. The Investigator, is not qualified to comment on technical matters such as similar projects, technical equipment and after sales service. However, other aspects of the material on file appear to indicate that full marks should not have been given in respect of CVs, as these were not present in the tender submission examined by the Investigator. Further, a pre-qualifying requirement for the tender was that the company should have three years of average annual manpower and management staff in the company including service technicians; according to the Companies Registration Office Company 1 was only established in 2014 and thus, on the basis of the documentation on file, could not have met the section criteria.

⁸ The consideration of this tender was restricted to a desk based review. Concerns arising from lacunae and inconsistencies in respect of Company 1 and Company 3 (see Term of Reference 1 a) iv) had been brought to the attention of An Garda Síochána in an earlier stage of the investigation. Accordingly, and because the same two companies were involved in this contract, the investigator restricted his analysis to a desk based review of available documents.

Recognising that the consideration of the tender was desk based and that further information may be available, the Investigator is of the opinion that the tender evaluation process appears flawed and that Company 1 could have been excluded from the process and, once allowed in, should not have received maximum marks in at least some of the categories.

7.3 1, a), viii – Finding

- **In respect of the summer works scheme contract, a shortened tender response of 5.5 days was suboptimal. The Investigator recognises the urgency of the works programme to allow for school opening. Only one company responded to the tender, Company 1, with which the CE had a family connection.**
- **In respect of the drawdown contract, the Investigator is of the opinion that the tender evaluation process appears flawed and that Company 1 could have been excluded from the process initially and, once allowed in, could not have received maximum marks in at least some of the categories.**

7.4 1, a), viii – Recommendations

- **In respect of the summer works scheme contract, reduced tender times bring the risk of diminished competition and thus increased costs. While a shortened tender response time is provided for in the Department guidelines, this should only be used *in extremis*, be fully justified, and auditable, and documented at the time of the decision to reduce the tender response time. Further, every effort should be made, within procurement guidelines, to maximise the opportunity for tenderers to make submissions so as to ensure competition is maximised.**
- **Should the restriction on the drawdown contract element of the investigation be lifted, the Investigator recommends that Company 3 be requested to provide any and all documentation relating to this tender process to determine if CVs and financial information, not present in the files of the ETB, were present for the evaluation.**

8. Terms of Reference 1 a) ix and Matter Under Term of Reference 2 b)

8.1 Introduction

In respect of Term of Reference 1 a) ix, the preceding statement of requirements is:

'To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matter[s]:

- *The sequence of events and the nature of the particular problems which gave rise to claims for additional payments on a building project referred to in the C&AG audit'*

8.2 1 a) ix – Narrative

'The sequence of events and the nature of the particular problems which gave rise to claims for additional payments on a building project referred to in the C&AG audit'

On 1st July 2014 KWETB accepted a tender from Company 4 for the construction of a new school (School 2). A contract programme dated 12th May, 2014 was for a completion date of 23rd September, 2015. On 13th April, 2015 Company 4 proposed a new completion date of 31st August, 2015 but this was not requested by the Employer's Representative.

A letter dated June 2015, signed by the CE and addressed to the Employer's Representative (Person A) requesting activation of a plan with the contractor to ensure that partial completion was achieved to enable occupation of the building by the start of the school year, was made available to the Investigator. It should be noted that in correspondence with the Investigator, the Employer's Representative states that this letter was not received by him until December 2015. The reason for the difference between the date of the letter and the receipt by the Employer's Representative has not been established.

On 30th November, 2015 Company 4 submitted an acceleration claim. As part of the claim the Company asserts that a representative of the Company 'was met by the employer on site in May 2015 and was instructed to do what was necessary to ensure that the new school was opened safely for September 2015'. The CE did visit the site on several occasions between May and September, 2015 to check on progress, but not for formal site meetings.

Agreement on the costs of the project was made the subject of conciliation on 15th April 2016. The final agreed figure was 909,988 EUR of which 483,000 EUR was for costs arising from a requirement for early completion - 'in effect' an acceleration – according to the Conciliator's report. The Conciliator in his determination notes that 'In June 2015 the Employer⁹ issued a letter to [Company 4] confirming that the School Building must be complete and ready for occupation by 1st September 2015'. It is not clear whether the letter the Conciliator is referring to is the same letter as that dated June 2015 and addressed by the CE to the Employer's Representative. The CE denies writing directly to Company 4 in June 2015. Person A, likewise, did not issue a written instruction nor is there evidence to this Investigator of the question of acceleration arising at site meetings during this period. It seems likely, if Company 4's assertions about an on-site meeting are correct, that visits by the CE and discussion on site to check on progress resulted in an interpretation by the contractor as a request for completion for the opening of the School at the beginning of the School year and ultimately as an interpretation – by the Conciliator as - 'in effect' – an instruction for acceleration.

8.3 1 a), ix – Finding

- **A Conciliation hearing found that 'in effect' an acceleration request was issued. Person A denies issuing such an instruction as the Employer's Representative. The CE denies writing directly to Company 4. It is likely that the CE, at some form of on-site gathering in June 2015, requested that the school be ready for opening in September, 2015 and that this request was interpreted as a request for acceleration.**
- **The apparent direct involvement of the Employer, as represented here by the CE, particularly when the Employer's Representative appears to have been attempting to hold the contractor to the terms of the contract was ill-conceived and likely to lead to confusion and increased difficulty in agreeing final accounts.**

8.4 1 a), ix – Recommendation

- **The role of the Employer's Representative, as established in construction practice in various guidelines, should be respected in all building projects for which the KWETB is the employer.**

8.5 2, b) – Narrative

The matter concerns the provision of a new school building for School 3 for which agreement on the final account is disputed.

⁹ This is understood to mean KWETB

At a meeting on the 27th September, 2016, the final account for the project was discussed. The CE asserts that it was necessary to hold the meeting because there had been a significant lapse in time post-completion of the contract. Following the meeting at which a member of the design team, but not the Employer's Representative (who was not invited – as confirmed by the ER to the Investigator) -, the CE of KWETB and representatives for the contractors, were present, the member of the design team present submitted a recommendation to the Employer's Representative for payment. The Employer's Representative wrote back disagreeing with the recommendation and noting their concerns. On 29th May, 2017 the CE wrote to the Employer's Representative requiring the issuance of a Penultimate Payment Certificate and, given the near-ending of the Defects Period, advising the full release of Retention. The Employer's Representative is refusing to release the certificate asserting that monies will not be paid for works not completed.

The Department's guidelines¹⁰ note that the Employer's Representative is responsible for issuing certificates for payment. The Guidelines do not provide for the Employer, in the absence of the Employer's Representative, agreeing a final account.

It will be noted that the intervention by the CE in the building project noted above (Term of Reference 2 b)) involved the same main building contractor as that in the project noted in Term of Reference 1 a), x in the following section.

8.6 2, b) – Finding

- **The CE attended a meeting at which the Employer's Representative was not present, and had not been invited, agreed a final account figure and, issued instructions to the Employer's Representative to issue the relevant certificates. Such actions subordinate the role of the Employer's Representative and run counter to the Department's guidelines. The direct involvement of the Employer, as represented here by the CE, was ill-conceived and has the potential to lead to confusion and increased difficulty in agreeing final accounts.**

8.7 2, b) – Recommendation

- **The role of the Employer's Representative, as established in construction practice in various guidelines, should be respected in all building projects for which the KWETB is the employer.**

¹⁰ https://www.education.ie/en/School-Design/Procedures-and-Cost-Plans/pbu_DTP-2012_Construction_Stage4.doc

9. Terms of Reference 1 a), x

9.1 Introduction

The relevant Term of Reference with the preceding statement of requirements is:

'To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matter[s]:

- *'To examine and report on the purpose for and the procurement and award of a contract to an independent expert for a school building project'*

9.2 1 a), x – Narrative

'To examine and report on the purpose for and the procurement and award of a contract to an independent expert for a school building project'

KWETB is the contracting authority for the building of School 1. In 2016 a dispute arose between the main contractor and some members of the design team. The Investigator is aware that this contract is the subject of ongoing disputes and that the project has proved problematic.

The CE asserts that, in an attempt to solve the problems on the contract, he procured, on an emergency basis, the services of Company 5 as represented by a specific individual; Person B. A letter of engagement issued by Company 5 was signed on 15th August, 2016 by the CE of KWETB and Person B on behalf of Company 5. The purpose of this contract was, according to the letter of engagement, to act as mediator/expert in the dispute. The CE signed on behalf of KWETB and Person B on behalf of Company 5. The total amount paid to Company 5 in respect of this contract was 9,787.75 EUR.

On 23rd January, 2017, in response to a request from the main contractor, KWETB instructed Company 5 to expand the scope of the work to include the assessment of Quantum. A contract to that effect was signed on the 23rd January 2017 by the CE of KWETB. The total amount paid by KWETB to Company 5 in respect of the expanded scope of work was 14,138.85 EUR.

The Procurement Guidelines for KWETB provide for urgent situations - under the heading 'Single or Sole Source' suppliers. Where it is intended to use the provision, the guidelines require that documentation on the approval process be held on file for audit purposes. No such documentation has been provided to the Investigator.

A matter of concern to the investigation is the issuing of a follow-up contract to expand the services provided by Company 5. The Procurement Guidelines, drawn from EU and Irish requirements, specifically prohibit entering into open-ended agreements that roll over. The Investigator is of the opinion that the signing of a second contract represents a roll-over. It has been confirmed to the Investigator, by members of the KWETB executive, that the ETB has requested that the process be terminated. However, Company 5 has informed the ETB that this can only be done if both parties agree; currently Company 5 are still making determinations on behalf of the main contractor. KWETB are currently seeking legal advice on extracting the Board from the contract.

During the course of the investigation it came to the attention of the Investigator that the determinations made by the representative of Company 5 have been the subject of dispute including allegations of bias in the determinations. The Employer's Representative wrote to the KWETB on 26th July, 2017 expressing concern over the status of Company 5 in the context of the contract governing the project and the independence of the representative of Company. The Investigator is not qualified to consider the technical aspects of the disputed determinations. However, it is a matter of concern that the appointment of a mediator directly by the CE of KWETB, in a manner that appears to this Investigator to be outside the agreed contract requirements for dispute resolution¹¹, undermines the authority of the Employer's Representative to act in the best interests of the Employer. It is not possible to determine what the long-term effect of this intervention will be because the project is not yet complete but it would appear likely that disputed determinations, particularly where those determinations have been made through an unagreed process, may lead to enhanced claims.

It will be noted that the intervention by the CE in the building project noted above involved the same main building contractor as that in the project noted in Term of Reference 2 b) in the previous section.

The CE, in the course of the response to the report, argues that they were obliged to intervene in the contract described here in section 9 and in the contracts described in section 8 because of concerns about the completion of the contracts. These concerns arose, because the CE claims, from difficulties in the contract process and dispute between the Employer's Representative and contractors. The Investigator understands how such concerns might arise but does not accept that interventions in the manner described are anything other than ill-conceived and thus are likely to lead to additional claims.

¹¹ <http://constructionprocurement.gov.ie/wp-content/uploads/PW-CF1-v2.2-09-01-17.pdf>

9.3 1 a), x – Findings

- The CE entered into a contract with Company 5 on the basis of urgency – no approval process documentation is available. The CE subsequently entered into an extension of the contract thus, *defacto*, entering into an open-ended arrangement. Both of these contracts breached the KWETB's own procurement guidelines and, in the case of the roll-over, the EU and Irish requirements. The arrangement with Company 5 appears to this Investigator to be outside the agreed contract process for dispute resolution. The determinations of the expert are contested.
- The engagement by the CE of a mediator, apparently outside the agreed contract process for dispute resolution, was ill-conceived and was likely to lead to confusion and increased difficulty in agreeing final accounts.

9.4 1 a), x – Recommendations

- The Procurement Policy of the KWETB is based on national and EU requirements and should be adhered to in all cases without exception.
- The role of the Employer's Representative, as established in construction practice and through various guidelines, should be respected in all building projects for which the KWETB is the employer.

10. Summary of Findings and Recommendations

'Compliance with Department procedures in relation to the procurement and delivery of various building projects'

Findings

- Term of Reference 1 a) iv – There are several inconsistencies surrounding the procurement of the minor building works that are beyond the powers of the investigator to reconcile and this matter has been referred to the Garda Economic Crime Bureau.
- Term of Reference 1 a) viii – A contract for heating and plumbing services for a summer works scheme did not breach Department procurement requirements but the process was suboptimal. In respect of a tender for a drawdown contract, the tender evaluation process appears flawed.
- Term of Reference 1 a) ix – The acceleration ('in effect' - as found by a Conciliator) of a school building project was not in accord with Department contract management guidelines.
- Term of Reference 1 a) x – The procurement of a mediator by the CE for a school building project did not accord with procurement guidelines. The mediator's appointment did not appear to meet the contract requirements for dispute resolution.
- Term of Reference 2 b) – The intervention by the CE in the final account agreement process was not in accord with Department contract management guidelines.

'The governance arrangements in relation to procurement matters in 2015, 2016 and to date in 2017'

Finding

- Effective governance of procurement requires that a range of policies, procedures and structures be in place to give effect to a robust and transparent system of procurement. In general, the main components of a robust and transparent procurement framework are in place in the KWETB. While there are gaps, which are addressed in the recommendations in section 4.6, they, of themselves, do not explain the failures, noted elsewhere in this report, to meet the procurement requirements approved by the KWETB.

Recommendations

- The Board of KWETB, utilising the services of an external agency, should develop a checklist of policies and procedures covering procurement, and any related matters, to

include their version control, promulgation and sign off by Board members and members of the Executive.

- The Board of KWETB, utilising the services of an external agency, should develop and approve a policy and procedures for managing real or perceived conflicts of interest at Board or Executive level.
- The Board of KWETB, utilising the services of an external agency, should review the arrangements for the functioning of the Audit Committee to ensure its effectiveness and make adjustments as required.
- The Board of KWETB should take an active, rather than passive, role in ensuring that there is effective oversight of governance arrangements within the KWETB.

'The effectiveness of arrangements put in place, in the years 2015, 2016 and to date in 2017, by the delegation of functions or otherwise to ensure a conflict of interest did not occur with particular regard to procurement, asset disposal or leasing that concerned companies referred to in the C&AG Audit'

Finding

- If adhered to, the procurement governance arrangements in place in 2015, 2016 and 2017 were sufficient to ensure conflicts of interest did not arise in procurement matters. There is disagreement on whether or not the procurement function was delegated.

Recommendation

- Any functions delegated under Section 16 of the Act should be clearly and unambiguously laid out in a document prepared by the CE and tabled at the Board.
- The Board of KWETB should take an active, rather than passive, role in ensuring that there is effective oversight of governance arrangements within the KWETB.

'The access to and usage of an ETB rented property by a company referred to in the C&AG Audit, the origin of this arrangement, the agreements reached, the conditions attached including rent level, payments in respect of works carried out, the timeliness of invoicing for rent and utilities due and receipt of same'

Finding

- The Investigator finds several inconsistencies in the narrative noted above:-
 1. The CE has stated in correspondence and in an aide memoir that Company 1 was requested to make the property safe in return for a rent waiver. There is no contemporaneous documentary or oral confirmation from other than the CE, other than the Tender Report and documentation produced on the 19th December, 2017 that tendering took place.

2. In Section 4.7 the CE asserts that there was delegation of the procurement function from mid-2013. That being the case, it is not clear why other staff within the ETB were not aware of a tendering process in respect of this project at that time. It should also be noted that the COO maintains that procurement was not delegated to him.
3. The Tender Report is dated 15th December, 2015. The first invoice is dated 8th January, 2016. Given the intervening Christmas period this appears to be a very short period of time to allow response to the successful tenderer, for that contractor to mobilise on site and for the work to be undertaken.
4. The fact that an invoice for rent and utilities to cover a period of occupation prior to the date of the tender report was issued in July 2017 supports the CE's original assertion that Company 1 was requested to undertake remedial works in return for a rent waiver and was thus already in occupation of the building prior to the date of the tender report.
5. With the exception of the tender report and documentation received shortly before the deadline for response, there is no evidence that a tender process took place. The Investigator cannot make a finding as to the authenticity of the tender process disclosed at a very late stage in the investigation.
6. The CE, in an email, states that the work for the 19,100 EUR invoice noted above was tendered but the additional work was not.

Recommendation/Action

- In the absence of the establishment of the authenticity of the tender report and documentation, the Investigator cannot make a finding as to whether an acceptable procurement process for the remedial works took place. Determination of the authenticity of the tender report and documentation reconciliation of the inconsistencies requires investigative powers beyond the scope of this Investigation and the matter has been forwarded to the Garda National Economic Crime Bureau.

'The business case for the ETB's intended use of the rented property and any impact of its unavailability for this intended use'

Findings

- There was a demand for training in the KWETB. This demand was articulated in a service plan submitted to SOLAS. The ETB made the necessary planning arrangements to ensure that training could commence in a timely manner. The occupation of the property designated for training provision by Company 1 between late 2015 and 2016 did not hinder the use of the property for any planned training activity.

Recommendation

- Notwithstanding the urgency of a requirement to establish education and training provision in any location, the Executive and Board members of the Kildare and

Wicklow Education and Training Board should ensure that the requirements of the Code of Practice for the Governance of Education and Training Boards in respect of Board approval for 'the acquisition, development and disposal of land, including buildings, or any interest in land, including buildings' are adhered to.

'The operation and use of pool vehicles and business case for same'.

Finding

- **A business case for the use of car pool vehicles was provided to the Investigation. A vehicle log covering the period 2014 to the present is in existence.**

Recommendation

- **The business case for maintaining a collection of car pool vehicles should be reviewed to ensure currency and the procedure for recording vehicle use examined to ensure that it meets standards required to ensure no BIK obligations accrue.**

'The sale of a motor vehicle and the timelines in relation to the decision to dispose of the vehicle, the assessment of its value, the date of sale, the supporting documentation in relation to the sale and the timeliness of receipt of the proceeds of same by the ETB'.

Finding

- **The documentation provided by KWETB shows a logical sequence of events leading to the sale of the van. The delay in receipt of sale proceeds is explained, but the offset of proceeds against the purchase of other items at auction cannot be regarded as good financial management. The difference between the purchase price, as reflected in the insurance valuation, and the sale price does not represent a good value transaction.**

Recommendation

- **The practice of offsetting sales proceeds against items purchased, as here, and as initially proposed at section 5 above, is not a good practice and should cease. Future purchases of motor vehicles should be from reputable dealers willing to provide guarantees.**

'The tender assessment process in relation to a drawdown contract awarded to a company referred to in the C&AG Audit'

Finding

- **In respect of a summer works scheme contract, a shortened tender response of 5.5 days was suboptimal. The Investigator recognises the urgency of the works programme to allow for school opening. Only one company responded to the tender, Company 1, with which the CE had a family connection.**
- **In respect of the drawdown contract, the Investigator is of the opinion that the tender evaluation appears flawed and that Company 1 could have been excluded from the**

process initially and, once allowed in, could not have received maximum marks in at least some of the categories.

Recommendations

- In respect of the summer works scheme contract, reduced tender times bring the risk of diminished competition and thus increased costs. While a shortened tender response time is provided for in the Department guidelines, this should only be used *in extremis*, be fully justified, and auditable, and documented at the time of the decision to reduce the tender response time. Further, every effort should be made, within procurement guidelines, to maximise the opportunity for tenderers to make submissions so as to ensure competition is maximised.
- Should the restriction on the drawdown contract element of the investigation be lifted, the Investigator recommends that Company 3 be requested to provide any and all documentation relating to this tender process to determine if CVs and financial information, not present in the files of the ETB, were present for the evaluation.

'The sequence of events and the nature of the particular problems which gave rise to claims for additional payments on a building project referred to in the G&AG audit'

Finding

- A Conciliation hearing found that 'in effect' an acceleration request was issued. Person A denies issuing such an instruction as the Employer's Representative. The CE denies writing directly to Company 4. It is likely that the CE, at some form of on-site gathering in June 2015, requested that the school be ready for opening in September, 2015 and that this request was interpreted as a request for acceleration.
- The apparent direct involvement of the Employer, as represented here by the CE, particularly when the Employer's Representative appears to have been attempting to hold the contractor to the terms of the contract was ill-conceived and likely to lead to confusion and increased difficulty in agreeing final accounts.

Recommendation

- The role of the Employer's Representative, as established in construction practice in various guidelines, should be respected in all building projects for which the KWETB is the employer.

The matter concerns the provision of a new school building for School 3 for which agreement on the final account is disputed.

Finding

- The CE attended a meeting at which the Employer's Representative was not present, and had not been invited, agreed a final account figure and, issued instructions to the Employer's Representative to issue the relevant certificates. Such actions subordinate the role of the Employer's Representative and run counter to the Department's guidelines. The direct involvement of the Employer, as represented

here by the CE, was ill-conceived and has the potential to lead to confusion and increased difficulty in agreeing final accounts.

Recommendation

- **The role of the Employer's Representative, as established in construction practice in various guidelines, should be respected in all building projects for which the KWETB is the employer.**

'To examine and report on the purpose for and the procurement and award of a contract to an independent expert for a school building project'

Findings

- **The CE entered into a contract with Company 5 on the basis of urgency – no approval process documentation is available. The CE subsequently entered into an extension of the contract thus, *defacto*, entering into an open-ended arrangement. Both of these contracts breached the KWETB's own procurement guidelines and, in the case of the roll-over, the EU and Irish requirements. The arrangement with Company 5 appears to this Investigator to be outside the agreed contract process for dispute resolution. The determinations of the expert are contested.**
- **The engagement by the CE of a mediator, apparently outside the agreed contract process for dispute resolution, was ill-conceived and was likely to lead to confusion and increased difficulty in agreeing final accounts.**

Recommendations

- **The Procurement Policy of the KWETB is based on national and EU requirements and should be adhered to in all cases without exception.**
- **The role of the Employer's Representative, as established in construction practice and through various guidelines, should be respected in all building projects for which the KWETB is the employer.**

Appendix One

Section 40 of the Education and Training Board Act, 2013

Report on operation of education and training board.

40.— (1) Where the Minister is of the opinion that any of the functions of an education and training board are not being effectively discharged, the Minister may, having considered any representations made to him or her under subsection (3), appoint a person (in this section referred to as an “investigator”) to carry out an investigation into the performance by the board of its functions either generally or with reference to any particular function during such period as the Minister may determine.

(2) The Minister shall, by notice in writing, inform the education and training board concerned where he or she proposes to appoint an investigator under subsection (1).

(3) A notice under subsection (2) shall state that the education and training board may make representations to the Minister in relation to the proposed appointment not later than 14 days after the service of the notice on the board.

(4) An investigator shall be entitled at all reasonable times to enter any premises occupied by the education and training board concerned and shall be afforded every facility and cooperation by the board, chief executive and members of staff of the board, including access to all records, to perform his or her functions.

(5) An investigator shall on completion of his or her investigation prepare a draft report on the investigation.

(6) An investigator shall provide a copy of the draft report prepared under subsection (5) to the education and training board concerned and that board may, within one month from the provision of the report to it, make representations in writing to that investigator about that report.

(7) After consideration of any representations made to the investigator under subsection (6), that investigator may make any amendments to the draft report that he or she thinks appropriate.

(8) The investigator shall submit his or her final report to the Minister as soon as practicable after the report is completed.

(9) A chief executive and an education and training board shall supply such information regarding the performance of the board’s functions as—

- (a) the Minister may from time to time require, and
- (b) an investigator requires for the performance of his or her functions under this section.

Appendix Two

Terms of Reference

In the course of the Audit by the Comptroller & Auditor General of the Kildare & Wicklow ETB's financial statements for 2015 (which is ongoing) the C&AG brought a number of issues to the attention of the Department of Education and Skills. The Department corresponded with Kildare & Wicklow ETB and sought responses to the issues concerned.

Having considered the issues raised by the C&AG and the subsequent correspondence between the Department and the ETB, in exercise of his power under Section 40 of the ETB Act 2013 the Minister for Education and Skills has appointed an investigator to carry out an investigation into the performance by the board of its functions particularly in relation to public procurement, usage and disposal of assets and propriety matters and to submit a final report to the Minister as soon as practicable after the report is completed.

The terms of reference for this investigation are:

1. a) To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matters:
 - i. Compliance with Department procedures in relation to the procurement and delivery of various building projects
 - ii. The governance arrangements in relation to procurement matters in 2015, 2016 and to date in 2017
 - iii. The effectiveness of arrangements put in place, in the years 2015, 2016 and to date in 2017, by the delegation of functions or otherwise to ensure a conflict of interest did not occur with particular regard to procurement, asset disposal or leasing that concerned companies referred to in the C&AG Audit
 - iv. The access to and usage of an ETB rented property by a company referred to in the C&AG Audit, the origin of this arrangement, the agreements reached, the conditions attached including rent level, payments in respect of works carried out, the timeliness of invoicing for rent and utilities due and receipt of same
 - v. The business case for the ETB's intended use of the rented property and any impact of its unavailability for this intended use
 - vi. The operation and use of pool vehicles and business case for same
 - vii. The sale of a motor vehicle and the timelines in relation to the decision to dispose of the vehicle, the assessment of its value, the date of sale, the supporting documentation in relation to the sale and the timeliness of receipt of the proceeds of same by the ETB
 - viii. The tender assessment process in relation to a drawdown contract awarded to a company referred to in the C&AG Audit
 - ix. The sequence of events and the nature of the particular problems which gave rise to claims for additional payments on a building project referred to in the C&AG audit
 - x. To examine and report on the purpose for and the procurement and award of a contract to an independent expert for a school building project.

- b) Where lacunae, inconsistencies or insufficient clarity are identified, to establish the factual position in relation to the matters in question in so far as it is reasonably practicable to do so.
- c) In the light of the above, to report and make recommendations as appropriate, in relation to the ETB's compliance with the relevant requirements regarding governance, procurement, ethics and Department policies and procedures.
2. The investigation may include:
- a) any other matter which was raised in the C&AG Audit or the Department's subsequent correspondence which, in the light of the ETB's response, the Investigator considers is a cause of concern or a matter of public interest, and
 - b) any other matter which, during the course of his/her investigation, comes to the attention of the Investigator and which the Investigator considers is a cause of concern or a matter of public interest. If the Investigator considers that it is not feasible or appropriate to deal with such matters within this investigation, s/he may bring such matters to the attention of the Minister.
3. The investigation may encompass examination of documents and matters which relate to periods before or after the year 2015, if deemed relevant by the Investigator.
4. The investigator shall be entitled at all reasonable times to enter any premises occupied by Kildare & Wicklow ETB and shall be afforded every facility and cooperation by the board, chief executive and members of staff of the board, including access to all records, to perform his or her functions.
5. Where appropriate, the Investigator will interview or consult with any relevant member of staff of the Board, member of the Board, or any other person, in relation to the matters identified. The Investigator may revert to any party if further clarification or information is required.
6. The investigator will have access to any persons with relevant specialist expertise, as required.
7. To ensure that it is effective, the investigation will proceed on the basis that confidentiality will be maintained during the investigation process.
8. Following his/her investigation, the Investigator will prepare a draft report and a final report in accordance with the provisions of Section 40 of the Act.
9. It is envisaged that the investigation will be completed in Quarter 1 2018.
10. The terms of reference may be subject to such addition or amendment as the Minister considers appropriate in the context of this investigation.

Appendix Three

KWETB Response to Section 40 Investigation Draft Report

Background

On the 4th of October 2017 the Minister for Education and Skills in exercise of powers under Section 40 of the ETB Act 2013, appointed Mr Richard Thorn to carry out an investigation into the performance by KWETB of its functions particularly in relation to public procurement, usage and disposal of assets and propriety matters. The Board committed to engaging fully with the Ministerial Investigator from the outset.

Over the subsequent weeks, KWETB through its Executive, provided the Investigator with all material requested and the Board met with the Investigator who provided insight as to how he proposed to conduct the investigation. The Board notes the Investigator has acknowledged the cooperation received by him from KWETB.

During the course of the investigation, the Chairperson and Vice Chairperson announced their resignations on the 30th of November 2017. The CE at the time of the appointment of the Investigator has retired as of the 31st of December of 2017.

On the 21st of December 2017, the Board appointed Noel Merrick as Chairperson and John McDonagh as Vice Chairperson and KWETB has a new acting CE Rory O'Toole.

On the 2nd of January 2018, members were sent copies of the Confidential Draft Report prepared by Richard Thorn.

The Board has held meetings to consider the said Report on the 9th, 22nd and 30th of January 2018.

Legislative Scheme

The Legislative provision governing this matter is contained in S.40 of the Education and Training Boards Act 2013 which provides -

40.— (1) Where the Minister is of the opinion that any of the functions of an education and training board are not being effectively discharged, the Minister may, having considered any representations made to him or her under subsection (3), appoint a person (in this section referred to as an “investigator”) to carry out an investigation into the performance by the board of its functions either generally or with reference to any particular function during such period as the Minister may determine.

(2) The Minister shall, by notice in writing, inform the education and training board concerned where he or she proposes to appoint an investigator under subsection (1).

(3) A notice under subsection (2) shall state that the education and training board may make representations to the Minister in relation to the proposed appointment not later than 14 days after the service of the notice on the board.

(4) An investigator shall be entitled at all reasonable times to enter any premises occupied by the education and training board concerned and shall be afforded every facility and cooperation by the board, chief executive and members of staff of the board, including access to all records, to perform his or her functions.

(5) An investigator shall on completion of his or her investigation prepare a draft report on the investigation.

(6) An investigator shall provide a copy of the draft report prepared under subsection (5) to the education and training board concerned and that board may, within one month from the provision of the report to it, make representations in writing to that investigator about that report.

(7) After consideration of any representations made to the investigator under subsection (6), that investigator may make any amendments to the draft report that he or she thinks appropriate.

(8) The investigator shall submit his or her final report to the Minister as soon as practicable after the report is completed.

(9) A chief executive and an education and training board shall supply such information regarding the performance of the board's functions as—

(a) The Minister may from time to time require, and

(b) An investigator requires for the performance of his or her functions under this section.

As provided for in S40 (6) the Board has resolved to make representations to the Investigator and this document is to be regarded as same.

The Investigator's Findings and Recommendations

The Board hereby formally records it has noted each of the Investigator's Findings and Recommendations.

The Board's Response

The Board has commenced a positive response to the Investigation. It is committed to providing effective governance and to be guided by –

1. Strong commitment to integrity and ethical values.
2. Comprehensive stakeholder engagement.
3. Determining the interventions necessary to optimise the achievement of intended outcomes.
4. Developing the capacity of KWETB, including the capability of its leadership and the individuals within it.
5. Managing risks and performance through robust internal control.
6. Implementing good practices in transparency and reporting to deliver effective accountability.

The Board in that regard sought the response of the Acting CE of KWETB on the S.40 draft Report and same is annexed to this document at Appendix 1 and should be read as part of the Board's formal response. The Board has sought and obtained detail in relation to the timeline for Actions thereunder and the Director or Officer responsible for oversight of delivery.

In addition the Board has resolved to implement the following actions to address matters raised in the draft Report.

1. The Board to review all approvals to date regarding the acquisition, development and disposal of land, including buildings, or any interest in land, including buildings. This to comprise of a formal Register of same.
2. The Board shall direct the Executive to include all Licences in the Register mentioned at 1 above. For the purposes of clarity all licences being entered into by KWETB are to be placed before the Board for approval from this time forward.
3. The Board has resolved that "Conflict of Interest" will be item 2 on the agenda of all Board meetings.
4. The Board shall review the Codes of Conduct for members and staff forthwith.
5. The Board shall conduct a review of all procurement procedures within KWETB to ensure the transparency of same.
6. The Board is committed to full cooperation by it and all staff with any investigations which may be conducted by the Garda National Economic Crime Bureau.
7. The Board believes that an Ethics Registrar should be appointed by KWETB to oversee compliance with duties to oversee adherence to the Codes of Conducts which were issued to all members and employees, completion of Annual Declarations of Interests, and compliance with the law relating to ethics and standards in public office. The Board notes that the Act of 2013 does not put this role on a statutory footing in contrast with the legislative intervention by the Local Government Act of 2001 with regard to Local Authorities. The Board believes the Minister should give consideration to amending the Act to provide for this.
8. The management and reduction of risk is a governance matter of considerable importance to the Board. The Board, in the course of dealing with the matters herein became aware that issues pertaining to procurement within Kildare VEC were an issue in 2012 for the Comptroller and Auditor General. On its establishment under the 2013 Act, the Board of KWETB were not informed of this and believe that Board members and new Board members should have been briefed on same and should in the future be briefed on same if they are to be expected to discharge their duties of good governance. This should be addressed at Department level to provide a coherent national response. In the meantime the Board has agreed that "Risk" be an agenda item at each Board meeting.
9. The Board notes that the Investigator has recommended that certain matters be referred to the Garda National Economic Crime Bureau and the Board has been advised by a member that a Garda investigation has commenced with regard to matters pertaining to construction works at School 1. The Board would ask that the Department would disclose to the Board members all investigations that it is aware of into matters within the Board's jurisdiction.
10. The Board at paragraph 7 above has directed attention to what it sees as a lacuna in the legislation regarding Ethics. The Board is concerned that the 2013 Act should be reviewed in full as to whether amending legislation or Ministerial regulation would provide clarity in many areas. One fundamental absence in the Act is a lack of definition as to the meaning of "Board" throughout same. The Investigator and Department are directed to the fact that in the 2015 Code of Practice for Governance of Education and Training Boards it was felt necessary at page 5 to include a footnote stating " The term "Board" as used throughout this document refers to the entity comprising the elected and appointed members of the ETB" .It is respectfully submitted that a matter of such importance for the interpretation of much that is in the Act should be contained within the Act and not merely be clarified in a footnote to a document issued two years after the legislation.

The Board believes that such legislative review should examine the quora requirements for the Board and its committees and resourcing in general.

11. The Board has received a response from the Chairman and Members of the Audit Committee of KWETB to page 11 para 4, and pages 11/12 section 4.5 of the Findings and Recommendations contained in the Report. Same is attached as Appendix 2 to this Response and was adopted by the Board as part of its response.

The Board wishes that it be noted that the Audit Committee was asked by the Internal Audit Unit to identify risk issues in 2016. By letter of the 10/02/16 the Committee made a submission requesting it to review the Risk Register, Contracts of Services and largescale Procurement especially in non-core areas such as land and building purchases and building works. The response from the IAU of the 7/3/16 was to reject these as areas of audit. The areas it decided to proceed with were none of those addressed by the Audit Committee. The areas requested have a striking similarity to those which are the subject of this S.40 Investigation. The Board believes that it is legitimate for the Department to examine that sequence of events and to in examine in particular the IAU response to requests by the Audit Committee for resources to examine these matters.

Again the Board believes that it is a flaw in the legislative scheme that the Executive are not given a fixed period of time within which to respond to the Audit Committee after that Committee had conducted an Internal Controls Review.

The Board believes that the criticism that the Audit Committee is "not fit for purpose" is not directed at the Audit Committee of KWETB solely but to the "Audit Committees" as provided for in the 2013 Act and the Board opines that the structure and functional parameters of same are flawed and require review.

12. The Board notes that the 2016 Accounts have not been brought before it for approval. The Board is committed to subjecting them to scrutiny with regards to issues raised in this Report.
13. The Board is committed to pursuing and scrutinising all matters of concern raised by the Comptroller and Auditor General and not referred to in this Report.
14. The Board is of the view that it is in the interests of all stakeholders in KWETB that this Report and Response be made public by the Minister as soon as possible.

Dated 1st day of February 2018

Noel Merrick

Chairperson of Kildare and Wicklow ETB

Appendix One

Acting Chief Executive's Response to the Chairperson of KWETB on the Section 40 Investigation Draft Report

Introduction

On behalf of the KWETB Executive, I am pleased to provide the following response on the Investigation Draft Report recently provided to the Board by Dr. Richard Thorn. This submission is intended to inform the Board's formal response to the Draft Report, due on 2 February 2018. As the draft report is confidential to the Board, this response is prepared in collaboration with the KWETB Directorate only.

The Draft Report outlines a number of findings and provides recommendations arising from those findings. This submission identifies key actions carried out to date by KWETB which will contribute to addressing the recommendations outlined in the report. The narrative and findings were also considered in the preparation of this response. In addition to actions completed to date, the submission identifies future and in-progress actions which will be required to ensure that KWETB conducts all activities to the highest standard. The actions and responses identified in this submission are focused on addressing shortcomings identified in the Draft Report and they are embedded in a framework of KWETB governance and improvement strategies.

While the findings of this Draft Report are clearly a matter of regret for our organisation, the recommendations align clearly with organisational, leadership, and change management processes that our senior management team are actively promoting and directing. The Draft Report identifies deficiencies in key practices, particularly around procurement and construction project management. I am satisfied to report at the outset that improvements in these areas will be achieved and it is heartening to read that the Investigator was of the view that the main components of a robust and transparent framework are in place in the KWETB.

This is a critical time for our organisation. The recent introduction of the leadership directorate for the ETB sector has provided the stimulus for a review of leadership approaches, organisational effectiveness, strategic direction, and corporate governance. On completion of the Phase 2 reconfiguration of the ETB sector, I hope that our organisation will be able to avail of improved structures and staffing levels. This workforce review of the ETB sector is in recognition of the dramatic changes in the scope of provision now under the remit of ETB's, including the very significant area of training.

An important element of the success of this action plan and indeed the wider improvement programme that is envisaged for KWETB is the effective relationship between the executive and non-executive branches of our organisation. In setting out this action plan, it is intended that non-executive members of our organisation will have a clear understanding of the roadmap to improvement that is currently in train and to invite observations on this approach. As part of the development of our Organisational Strategy, we will include a consultation phase with Members of the Board, Staff, Learners and Stakeholders in order to ensure that the organisation is effective and progressive.

I would also like to thank and acknowledge the commitment of staff to deliver on the improvements outlined in this response.

Summary

The Acting CE and Directorate have reviewed the draft report from Dr. Richard Thorn and current practices within KWETB and are responding to each of the recommendations in the form of an action plan with key deliverables, timelines, and outcomes to demonstrate our response to the findings. The Draft Report was made available to the Acting Chief Executive on 10 January 2018.

Details of key actions completed or planned are included in this submission. While some actions are identified as 'Complete', this should be interpreted as the completion of a key stage within a broader strategic response rather than the full achievement of a longer-term objective. Indicative time-frames for the completion of key actions are included. However, it is anticipated that these time-frames will be revised as the final recommendations of the report emerge and the wider Senior Management Team of KWETB engage with these proposals.

The general indicators of progress for each action are estimates and are described as follows:

0%	(Action Not Yet Commenced)
0% to 30%	(Action Commenced) Action at Early Stage of Commencement
30% to 60%	(Action in Progress) Action Substantially Commenced
60% to 90%	(Action in Progress) Action Entering Completion Stages
100%	(Action Complete)

The key actions identified include:

- KWETB has secured the services of an external expert agency (Irish Public Bodies) to advise on best practice and procedures in respect of Corporate Governance and to respond to any recommendations arising from reports on the performance of KWETB.
- KWETB is in negotiation with the Institute of Public Administration (IPA) to explore the suitability of the Institute to contribute to the organisational development programme in train.
- A review of existing procurement policies and procedures has been conducted.
- Workshops with Finance and Procurement teams were established to identify issues, clarify expectations and identify actions to enhance existing practices.
- A procurement plan for OGP Frameworks for 2018-2020 was prepared.
- Formal training in Public Procurement Systems and Practices for the Procurement Team was undertaken, including team members attending Certificate in Public Procurement Programme
- Actions to promote best procurement behaviour through leadership role modelling, encouraging appropriate behaviour and identifying behaviour that may not be aligned with expectations and policy are in train.
- A memorandum of clarification has been issued to all staff with a role in procurement to emphasise that practices on sales proceeds referred to in the report are inconsistent with the KWETB Procurement Policy.
- KWETB is currently reviewing the operation of a carpool with a view to the review or termination of this practice.
- Actions to identify staff training needs with respect to procurement to develop the competencies of the KWETB Procurement Team are in train.
- A plan to heighten awareness of procurement practices and policies across KWETB among Board Members, Senior Managers, Principals, FET Coordinators, OSD Managers and staff in general is in development. This will entail carrying out a procurement training needs analysis.

- The objective to review and optimise Asset Management Systems across KWETB is emphasised.
- An audit of current building projects in complete to confirm that no instructions to accelerate construction projects are in effect.
- KWETB confirms that the role of the Employer's Representative, as established in construction practice in various guidelines and relevant contracts is, and will continue to be, adhered to in all building projects for which the KWETB is the employer.
- KWETB confirms that it will adhere to DES technical guidelines and provisions included in relevant construction contracts.
- KWETB confirms that the Procurement Policy of the KWETB is based on national and EU requirements.
- The support of an external expert agency will be sought to assist KWETB in ensuring that the Procurement Policy will be adhered to through the development of a system of internal controls.

FINAL

Terms of Reference 1 a) To examine and report on the robustness of the ETB's responses to the issues raised in the C&AG Audit and the Department's subsequent correspondence and identify any lacunae, inconsistencies or insufficient clarity in the responses provided with particular reference to the following matters:

1.1 Terms of Reference 1 a) i. Compliance with Department procedures in relation to the procurement and delivery of various building projects

1.2 Terms of Reference 1 a) ii. The governance arrangements in relation to procurement matters in 2015, 2016 and to date in 2017

Findings

Effective governance of procurement requires that a range of policies, procedures and structures be in place to give effect to a robust and transparent system of procurement. In general, the main components of a robust and transparent framework are in place in the KWETB. While there are gaps, which are addressed in the recommendations in section 4.6, they, of themselves, do not explain the failures, noted elsewhere in this report, to meet the procurement requirements approved by the KWETB.

Recommendations

- The Board of KWETB, utilising the services of an external agency, should develop a checklist of policies and procedures covering procurement, and any related matters, to include their version control, promulgation and sign-off by Board members and members of the Executive.
- The Board of KWETB, utilising the services of an external agency, should develop and approve a policy and procedures for managing real or perceived conflicts of interest at Board or Executive level.
- The Board of KWETB, utilising the services of an external agency, should review the arrangements for the functioning of the Audit Committee to ensure its effectiveness and adjust as required.

Response

Actions Completed	Due Date	Progress	Owner
KWETB has secured the services of an external expert agency (Irish Public Bodies) to advise on best practice and procedures with respect of Corporate Governance and to respond to any recommendations arising from reports on the performance of KWETB	22/12/2017	100% (Action Complete)	Director OSD
Actions in Progress	Due Date	Progress	
KWETB is engaged with an external expert agency (Irish Public Administration) to determine their suitability to compliment the work of IPB with respect to enhancement in Corporate Governance	30/01/2018	50% (Action in Progress)	Director OSD
Actions Not Yet Commenced	Due Date	Progress	
Active engagement with external expert agency or agencies to develop	30/03/2018	10% (Action Commenced)	Director OSD

a strategy for a comprehensive review of Corporate Governance structures at KWETB and to address any gaps identified			
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1.3 Terms of Reference 1 a) iii. The effectiveness of arrangements put in place, in the years 2015, 2016 and to date in 2017, by the delegation of functions or otherwise to ensure a conflict of interest did not occur with particular regard to procurement, asset disposal or leasing that concerned companies referred to in the C&AG Audit

Findings

If adhered to, the procurement governance arrangements in place in 2015, 2016, and 2017 were sufficient to ensure conflicts of interest did not arise in procurement matters. There is disagreement on whether or not the procurement function was delegated.

Recommendations

Any functions delegated under Section 16 of the Act should be clearly and unambiguously laid out in a document prepared by the CE and tabled at the Board.

Response

Actions Completed	Due Date	Progress	
Internal review of existing procurement policies and procedures	29/09/2017	100% (Action Complete)	Director OSD
Workshop with Finance and Procurement team to identify issues, clarify expectations and identify actions to enhance existing practices	29/09/2017	100% (Action Complete)	Director OSD
Create a KWETB procurement plan compliant with OGP Frameworks for 2018-2020	29/12/2017	100% (Action Complete)	Director OSD
Formal training in Public Procurement Systems and Practices for the Procurement Team including team members attending Certificate in Public Procurement Programme	29/12/2017	100% (Action Complete)	Director OSD
KWETB representation on national ETBI procurement networking forum for best practice	29/09/2017	100% (Action Complete)	Director OSD
Actions in Progress	Due Date	Progress	
Promote best procurement behaviour through leadership role modelling, encouraging appropriate behaviour and identifying behaviour that may not be aligned with expectations and policy	28/12/2018	100% (Action Complete)	Director OSD
Carry out a comprehensive procurement training needs analysis to identify staff training needs with respect to procurement to develop the competencies of the KWETB Procurement Team	28/12/2018	75% (Action in Progress)	Director OSD

Implement plan to heighten awareness of procurement practices and policies across KWETB among Board Members, Senior Managers, Principals, FET Coordinators, OSD Managers and staff in general	28/09/2018	10% (Action Commenced)	Director OSD
Review KWETB staffing levels and roles and responsibilities as part of ongoing Workforce Planning	29/06/2018	10% (Action in Commenced)	Director OSD
Introduce best-practice document management and policy approval practices and conventions including revision dates, by whom, promulgation, changes, distribution etc.	29/06/2018	75% (Action in Progress)	Director OSD
Actions Not Yet Commenced	Due Date	Progress	
Develop an organisational chart and related policies clearly identifying areas of delegated responsibility with respect to procurement and other key decision-making functions, with these arrangements to be brought to the Board	30/03/2018	10% (Action Commenced)	Director OSD
With the support of an external expert agency, review protocols to ensure conflicts of interest do not influence procurement matters.	30/03/2018	20% (Action Commenced)	Director OSD

1.4 Terms of Reference 1 a) iv. The access to and usage of an ETB rented property by a company referred to in the C&AG Audit, the origin of this arrangement, the agreements reached, the conditions attached including rent level, payments in respect of works carried out, the timeliness of invoicing for rent and utilities due and receipt of same

Findings

There are several inconsistencies surrounding the procurement of the minor works that are beyond the powers of the investigator to reconcile and this matter has been referred to the Garda Economic Crime Bureau.

With the exception of the tender report, but no backup documentation, there is no evidence that a tender process took place. Further, with the exception of the tender report, the evidence suggests the absence of a tender process.

Recommendations

No recommendations identified

Response

Actions Completed	Due Date	Progress	Owner
KWETB has secured the services of an external expert agency (Irish Public Bodies) to advise on best practice and procedures with respect of Corporate Governance and to respond to any recommendations arising from reports on the performance of KWETB	22/12/2017	100% (Action Complete)	Director OSD

1.5 Terms of Reference 1 a) v. The business case for the ETB’s intended use of the rented property and any impact of its unavailability for this intended use

Findings

There was a demand for training in the KWETB. This demand was articulated in a service plan submitted to SOLAS. The ETB made the necessary planning arrangements to ensure that training could commence in a timely manner. The occupation of the property designated for training provision by Company 1 between late 2015 and 2016 did not hinder the use of the property for any planned activity.

Recommendations

Notwithstanding the urgency of a requirement to establish education and training in any location, the Executive and Board members of the Kildare and Wicklow Education and Training Board should ensure that the requirements of the Code of Practice for the Governance of Education and Training Boards in respect of Board approval for 'the acquisition, development and disposal of land, including buildings, or any interest in land, including buildings' are adhered to.

Response

Actions in Progress	Due Date	Progress	Owner
KWETB will ensure that the requirements of the Code of Practice for the Governance of ETB’s in respect of the Board approval for ‘the acquisition, development and disposal of land or any interests in land including buildings’ are adhered to and recorded appropriately in Board minutes	30/03/2018	50% (Action in Progress)	Director OSD

1.6 Terms of Reference 1 a) vi. The operation and use of pool vehicles and business case for same

Findings

The business case for the use of carpool vehicles was provided to the investigation. A vehicle log covering the period 2014 to the present is in existence.

Recommendations

The business case for maintaining a collection of carpool vehicles should be reviewed to ensure currency and the procedure for recording vehicle use examined to ensure that it meets the standards required to ensure no BIK obligations accrue.

Response

Actions in Progress	Due Date	Progress	Owner
KWETB is currently reviewing the operation of a carpool with a view to the review or termination of this practice	30/03/2018	50% (Action in Progress)	Director OSD

1.7 Terms of Reference 1 a) vii. The sale of a motor vehicle and the timelines in relation to the decision to dispose of the vehicle, the assessment of its value, the

date of sale, the supporting documentation in relation to the sale and the timeliness of receipt of the proceeds of same by the ETB

Findings

The documentation provided by KWETB shows a logical sequence of events leading to the sale of the van. The delay in receipt of sale proceeds is explained, but the offset of proceeds against the purchase of other items at auction cannot be regarded as good financial management. The difference between the purchase price, as reflected in the insurance valuation, and the sale price does not represent a good value transaction.

Recommendations

The practice of offsetting sales proceeds against items purchased, as here, and as initially proposed at Section 5 [above], is not a good practice and should cease. Future purchases of motor vehicles should be from reputable dealers willing to provide guarantees.

Response

Actions Completed	Due Date	Progress	Owner
A memorandum of clarification has been issued to all staff with a role in procurement to emphasise that the practices on sales proceeds referred to in the recommendation are inconsistent with the KWETB Procurement Policy	16/01/2018	100% (Action Complete)	Director OSD

1.8 Terms of Reference 1 a) viii. The tender assessment process in relation to a drawdown contract awarded to a company referred to in the C&AG Audit

Findings

A contract for heating and plumbing services did not breach Department procurement requirements but the process was suboptimal

A shortened tender response of 5.5 days was suboptimal. The investigator recognises the urgency of the works program to allow for school opening. Only one company responded to the tender, Company 1, with which the CE had a family connection.

Recommendations

Reduced tender times bring the risk of diminished competition and thus increased costs. While a shortened tender response time is provided for in the Department guidelines, this should only be used in extremis, be fully justified, and auditable, and documented at the time of the decision to reduce the tender response time. Further, every effort should be made, within procurement guidelines, to maximise the opportunity for tenderers to make submissions so as to ensure competition is maximised.

Response

Actions Completed	Due Date	Progress	Owner
Internal review of existing procurement policies and procedures	29/09/2017	100% (Action Complete)	Director OSD
Workshop with Finance and Procurement team to identify issues, clarify expectations and identify actions to enhance existing practices	29/09/2017	100% (Action Complete)	Director OSD

Create a KWETB procurement plan compliant with OGP Frameworks for 2018-2020	29/12/2017	100% (Action Complete)	Director OSD
Formal training in Public Procurement Systems and Practices for the Procurement Team including three team members attending Certificate in Public Procurement Programme	29/12/2017	100% (Action Complete)	Director OSD
KWETB representation on national ETBI procurement networking forum for best practice	29/09/2017	100% (Action Complete)	Director OSD
Actions in Progress	Due Date	Progress	
Promote best procurement behaviour through leadership role modelling, encouraging appropriate behaviour and identifying behaviour that may not be aligned with expectations and policy	28/12/2018	100% (Action Complete)	Director OSD
Identify staff training needs with respect to procurement to develop the competencies of the KWETB Procurement Team	28/12/2018	50% (Action in Progress)	Director OSD
Implement plan to heighten awareness of procurement practices and policies across KWETB among Board Members, Senior Managers, Principals, FET Coordinators, OSD Managers and staff in general	28/09/2018	10% (Action Commenced)	Director OSD
Review KWETB staffing levels and roles and responsibilities as part of ongoing Workforce Planning	29/06/2018	10% (Action in Commenced)	Director OSD
Review and optimise Asset Management Systems across KWETB	29/06/2018	25% (Action in Progress)	Director OSD
Actions Not Yet Commenced	Due Date	Progress	
With the support of an external expert agency, review protocols to ensure conflicts of interest do not influence procurement matters, that systems of internal control are fit for purpose, and ensure compliance with relevant regulations	29/06/2018	25% (Action in Progress)	Director OSD
Clarify roles, responsibility and authority with respect to procurement processes and systems of internal control	29/06/2018	Action Not Yet Commenced	Director OSD

1.9 Terms of Reference 1 a) ix. The sequence of events and the nature of the particular problems which gave rise to claims for additional payments on a building project referred to in the C&AG audit

Findings

A Conciliation hearing found that 'in effect' an acceleration request was issued. Person A denies issuing such an instruction as the Employer's Representative. The CE denies writing directly to Company 4. It is likely that the CE at some form of on-site gathering in June 2015 requested that the school be ready for opening in September 2015 and that this request was interpreted as a request for acceleration.

The apparent direct involvement of the employer, as represented here by the CE, particularly when the Employer's Representative appears to have been attempting to hold the contractor to terms of the contract was ill-conceived and likely to lead to confusion and increased difficulty in agreeing final accounts.

Recommendations

The role of the Employer's Representative, as established in construction practice in various guidelines, should be respected in all building projects for which the KWETB is the employer.

Response

Actions Completed	Due Date	Progress	Owner
Conduct an audit of current building projects to confirm that no instructions to accelerate construction projects are in effect	16/01/2018	100% (Action Complete)	Acting CE
The role of the Employer's Representative, as established in construction practice in various guidelines and relevant contracts is, and will continue to be, adhered to in all building projects for which the KWETB is the employer.	01/12/2017	100% (Action Complete)	Acting CE
KWETB confirms that it will adhere to DES technical guidelines and provisions included in relevant construction contracts	01/01/2018	100% (Action Complete)	Acting CE
Actions in Progress	Due Date	Progress	
With the support of an external expert agency, develop a risk management architecture for KWETB with respect to construction projects	29/06/2018	25% (Action in Progress)	Director OSD

1.10 Terms of Reference 1 a) x. To examine and report on the purpose for and the procurement and award of a contract to an independent expert for a school building project.

Findings

The CE entered into a contract with Company 5 on the basis of urgency - no approval process documentation is available. The CE subsequently entered into an extension of the contract thus, de facto, entering into an open-ended arrangement. Both of these contracts breached the KWETB's own procurement guidelines and, in the case of the rollover, the EU and Irish requirements. The arrangement with Company 5 appears to this investigator to be outside the agreed contract process dispute resolution. The determinations of the expert are contested.

The engagement by the CEO of a mediator, apparently outside the agreed contract process for dispute resolution, was ill-conceived and was likely to lead to confusion and increased difficulty in agreeing final accounts.

Recommendations

The Procurement Policy of the KWETB is based on national and EU requirements and should be adhered to in all cases without exception.

The role of the Employer's Representative, as established in construction practice and through various guidelines, should be respected in all building projects for which the is the employer.

Response

Actions Completed	Due Date	Progress	Owner
The role of the Employer's Representative, as established in construction practice in various guidelines and relevant contracts is, and will continue to be, adhered to in all building projects for which the KWETB is the employer.	01/01/2018	Progress: 100% (Action Complete)	Acting CE
KWETB confirms that it will adhere to DES technical guidelines and provisions included in relevant construction contracts	01/01/2018	100% (Action Complete)	Acting CE
That the Procurement Policy of the KWETB is based on national and EU requirements is confirmed	16/01/2018	100% (Action Complete)	Director OSD
Actions in Progress	Due Date	Progress	
With the support of an external expert agency, develop a risk management architecture for KWETB with respect to construction projects	29/06/2018	25% (Action in Progress)	Director OSD
The support of an external expert agency will be sought to assist KWETB in ensuring that the Procurement Policy will be adhered to through the development of a system of internal control	29/06/2018	50% (Action in Progress)	Director OSD

1.11 Terms of Reference 2 b) The investigation may include: any other matter which, during the course of his/her investigation, comes to the attention of the Investigator and which the Investigator considers is a cause of concern or a matter of public interest. If the Investigator considers that it is not feasible or appropriate to deal with such matters within this investigation, s/he may bring such matters to the attention of the Minister.

Findings

The CE attended a meeting at which the Employer's Representative was not present, and had not been invited, agreed a final account figure and issued instructions to the Employer's Representative to issue the relevant certificates. Such actions subordinate the role of the Employer's Representative and run counter to the Department's guidelines. The direct involvement of the employer, as represented here by the CE, was ill-conceived and has the potential to lead to confusion and increased difficulty in agreeing final accounts.

Recommendations

The role of the Employer's Representative, as established in construction practice in various guidelines, should be respected in all building projects for which the KWETB is the employer.

Response

Actions Completed	Due Date	Progress	Owner
The role of the Employer's Representative, as established in construction practice in various guidelines and relevant contracts is, and will continue to be, adhered to in all	01/01/2018	Progress: 100% (Action Complete)	Acting CE

building projects for which the KWETB is the employer			
KWETB confirms that it will adhere to DES technical guidelines and provisions included in relevant construction contracts	01/01/2018	100% (Action Complete)	Acting CE
KWETB confirms that the Procurement Policy of the KWETB is based on national and EU requirements	01/12/2017	100% (Action Complete)	Director OSD
Actions in Progress	Due Date	Progress	
The support of an external expert agency will be sought to assist KWETB in ensuring that the Procurement Policy will be adhered to through the development of a system of internal control.	29/06/2018	50% (Action in Progress)	Director OSD
With the support of an external expert agency, develop a risk management architecture for KWETB with respect to construction projects	29/06/2018	25% (Action in Progress)	Director OSD

FINAL

Terms of Reference for Which No Recommendations Were Identified

1.12 Terms of Reference 1 b) Where lacunae, inconsistencies or insufficient clarity are identified, to establish the factual position in relation to the matters in question in so far as it is reasonably practicable to do so.

Findings

No findings or recommendations identified under this Term of Reference in the Draft Report.

1.13 Terms of Reference 1 c) In the light of the above, to report and make recommendations as appropriate, in relation to the ETB's compliance with the relevant requirements regarding governance, procurement, ethics and Department policies and procedures.

Findings

No findings or recommendations identified under this Term of Reference in the Draft Report.

1.14 Terms of Reference 2 a) The investigation may include: any other matter which was raised in the C&AG Audit or the Department's subsequent correspondence which, in the light of the ETB's response, the Investigator considers is a cause of concern or a matter of public interest

Findings

No findings or recommendations identified under this Term of Reference in the Draft Report.

Appendix Two

Response of the Chairman and Members of the Audit Committee of the KWETB to page 11 para. 4, and pages 11/ 12, section 4.5 – Findings & Recommendations, of the Thorn Report.

- The observations and findings outlined by Dr. Thorn on page 11 para. 4, and (4.5 1a1), are endorsed by the Audit Committee, as the issues highlighted do impact currently on the effective workings and role of the Audit Committee.
- The Audit Committee welcomes the recommendation on page 12 (4.5 1a2) that ***‘The Board of the KWETB, utilising the services of an external agency, should review the arrangements for the functioning of the Audit Committee to ensure its effectiveness and make adjustments as required’***
- The Audit Committee will engage with, and support, the external experts when appointed, to review, renew and craft the necessary processes and procedures, to ensure an effective new role and function for the KWETB Audit Committee going forward.

Investigation into Certain Matters in Kildare and Wicklow Education and Training Board

- In developing a revised role and function for the Audit Committee, the expert review exercise must consider;
 - the influences and impacts of the role of the Internal Audit Unit of the ETBs,
 - the existing guidelines for the funding and resourcing of the Audit Committee of the KWETB,
 - that the Chair and or representatives to the Audit Committee be invited to present their work progress to the Board at least once a year and invite the Board in turn to communicate their experience and concerns directly to the Audit committee,
 - the guidelines for Audit Committees as outlined in Section 45.(1) of the Education and Training Boards Act 2013.

Dr. Tony lenehan,
Chairman—Audit Committee KWETB.

22/01/2018