

FINANCE ADMINISTRATION: PUBLIC PROCUREMENT - VALUE FOR MONEY, ACCOUNTING AND OVERSIGHT RESPONSIBILITIES

The Financial (Stores) Regulations 1980, S.R.O. No. 23 of 1980 (Chap. 63:01, Laws of Dominica 1990 Revised Edition) which were continued in force under section 56 of the Finance (Administration) Act 1994, No 4 of 1994, contain provisions which promote the good governance principle of value for money and accountability in government procurement. The Act gave formal recognition to the long clamoured for request of the Director of Audit for value for money audit. [See Reports of 1985 – 1993]

Under section 6(3) of the Act Parliament has mandated that contracts for the supply of goods and services entered into by Accounting Officers must reflect these principles. An accounting officer is answerable to the Public Accounts Committee of the House of Assembly for the efficient management of and accounting for public funds entrusted to him as accounting officer. In other words he is directly answerable to Parliament for all monies received and spent by the Ministry or Department of which he is accounting officer. He must therefore appear before the Public Accounts Committee to answer questions concerning these accounts.

PARLIAMENT'S WATCHDOG

The Select Committee of the House known as the Public Accounts Committee (PAC) is established under order 72 of the Standing Orders of the House of Assembly. The PAC has the duty to examine the accounts of the Government of Dominica together with the report of the Director of Audit on such accounts. [Chap 1:01 Laws of Dominica, 1990 Revised Edition]. The PAC probably is the most powerful of Parliamentary Committees. Through hearings based on the Director of Audit's report it holds accounting officers and other officials who are responsible for financial control to account.

Section 6(6) of the Act mandates that accounting officers shall comply with any Regulation made by the Minister for Finance under section 3 of that Act.

Under section 3 of the Act of 1994 the Minister is empowered to make Regulations for the advantage, economy and safety of public moneys and public property. The Minister has made no such Regulations under that section of the Act. Section 56 of the Act of 1994, however, continues in force the Financial Stores Regulations 1980 in so far as they are not inconsistent with the Act of 1994.

Under section 3, the minister is also empowered to give directions and instructions as appear to him to be necessary and expedient for the advantage, economy and safety of public moneys and public property. This provision is often misconstrued and extended beyond what could reasonably be intended, especially as section 3(e) allows such directions and instructions to provide for the purchase, safe custody, issue, sale or other disposal of stores and other property. Sometimes ministers think they have uncontrolled discretion in the exercise of this power to give directions and instructions that are inconsistent with express statutory provisions.

Accounting officers have to be firm in containing such ministerial discretionary power within its proper limits. The limits of that ministerial discretion and power are clearly defined by the rider,

“for the advantage, economy and safety of public moneys”. Directions by the minister that are inconsistent with the Regulations or fail to take account of the statutory purpose are *ultra vires*, and the public service official may properly refuse to comply and should seek the advice of the principal legal advisor to the public service on their legality. “It is the duty of a public servant to observe legal norms and to give greater weight to those norms than to policy consideration”. (Gregory Tardi on Political Law in “The Law of Domestic Governing”, p. 1036)

ACCOUNTING OFFICER MUST OBTAIN VALUE FOR MONEY (VFM)

Regulation 262 of the Financial (Stores) Regulations spells out the responsibility of accounting officers with respect to the purchase of stores, plant, vehicles and equipment and the principles that they must follow in expending public funds.

The Regulation provides that: “Accounting Officers are responsible for ensuring that proper control and economy are exercised over the purchase of stores, plant, vehicles, equipment, etc, that the prices paid are fair and reasonable and the items purchased are received in good order and according to specification, and that the Government obtains full value for the public money expended.” [Emphasis added]

These free standing provisions apply to all public procurement, that is, all contracts entered into by the Government of Dominica with private persons for the supply of stores, plant, vehicles and equipment.

In the purchase of such stores section 6(6) of the Act of 1994 requires every accounting officer to comply with any Regulation made under the Act. Regulation 262 of the Financial (Stores) Regulations (saved under section 56 of the Act) is such a Regulation.

An accounting officer who fails to observe the provisions of Regulation 262 and therefore contravenes section 6(6) of the Act is liable to be surcharged by the Financial Secretary under section 44 of the Act of 1994. Personal responsibility attaches to the office of accounting officer.

Section 44 enacts, as far as is relevant:

“(2) Any officer who contravenes any provision of this Act or any Regulations made hereunder shall be liable to a surcharge in such sum as may be determined by the Financial Secretary.

“(3) The amount of the surcharge made under subsection (2) shall not exceed one-tenth of the annual salary of the officer concerned.”

Though rarely used this is a most important sanction. An accounting officer should not be allowed to breach a statutory prescription with impunity.

DIRECTOR OF AUDIT SAYS NO VFM OBTAINED IN GARBAGE BIN CONTRACT BY OFFICE OF THE PRIME MINISTER

The Director of Audit in his Report on the Audit of the Public Accounts for year ended 30th June, 2008, found that in the purchase from Logistical Supplies Solution Inc. “garbage bins of

less intrinsic value than what was quoted on the invoice and actually paid for was shipped to the Office of the Prime Minister” and that he expects the accounting officer in the Office of the Prime Minister to do everything legally possible to have “the estimated extra-ordinary gain realized on the garbage bins transaction (in the sum of \$557, 783.23) refunded to the Consolidated Fund.” He concluded that “the Government did not receive value for money as garbage bins of lesser quantity and value were received”. (Emphasis added. See Report of Director of Audit 2008,pp.72-75).

If, as the Director of Audit states, “the Government did not receive value for money” in that transaction then the Accounting Officer did not fulfill his responsibility under Regulations 262 to ensure that “the Government obtains full value for the public money expended”

This Report from the Director of Audit, therefore, provides *prima facie* evidence to invoke the provisions of sections 44 with 45 (a) and (i) of the Act of 1994.

Section 45, so far as relevant, provides:

“45. Circumstances which may give rise to action under section 44 includes: (a) failure to collect any moneys owing to Government for the collection of which a person is or was at the time responsible;

(i) failure to observe Financial Regulations or Procurement and Stores Regulations or other instructions given under proper authority.”

FINANCIAL SECRETARY EMPOWERED TO SURCHARGE

These findings of the Director of Audit indicate *prima facie* that the provisions of Regulation 262 were not complied with. Failure to observe this Regulation (and failure to collect the full sum “that remained accounted for on the garbage bin transaction”) is a circumstance which gives rise to action by the Financial Secretary under section 44 of the Act.

The Financial Secretary is empowered to put these statutory provisions in train. The last PAC did not complete its hearings on this matter. And no PAC has been constituted since the last General Elections.

PUBLIC PROCUREMENT GUIDELINES/PRINCIPLES EXIST

In his recommendations to Government the Director of Audit stated that “the Financial Secretary, Accountant General and the Director of Audit should meet to establish some minimum guidelines and procedures to handle all foreign purchases by accounting officers and to submit such for the approval of the Cabinet of Ministers. These minimum guidelines and procedures should be enforced as policy decisions (sic) until full procurement legislation is enacted”

Regulation 262 already provides statutory principles to be followed by accounting officers in public procurement contracts, including foreign purchases. These include (i) economy over purchase of stores (ii) fair and reasonable prices (iii) stores must be in good order and (iv) according to specification and (v) value for money must be obtained. These are the matters that

he is required to take into consideration when purchasing public stores, plant, vehicles and equipment.

REFUND FALLS SHORT OF DIRECTOR OF AUDIT'S FINDINGS

In 2009 a refund of \$425,700 was made to the Consolidated Fund by Andre Dopwell. This is \$132,083 short of the sum stated by the Director of Audit in his 2008 Report.

Under section 6 of the Audit Act 1994, No. 5 of 1994 the Director of Audit is required to call Parliaments' attention to any case in which he has observed that "public money has not been fully accounted for or paid where so required by law into the Consolidated Fund", or "where money has been expended without due regard to economy and efficiency." "Economy" here means that "the acquisition at the least cost and at the appropriate time of human and material resources in appropriate quantity and quality" [section 6(3)].

The Audit Act complements the Act of 1994, that is to say, both Acts together form part of the legal framework regulating the administration of public finance in the Commonwealth of Dominica.

The Director of Audit may feel constrained to deal with this shortfall in the refund in his 2009 Report to Parliament.

PRESS SAYS REFUND SHORTFALL GREATER

Media reports quoting journalist Lennox Linton's investigations and findings have stated that the refund made by Logistical Supplies Solution Inc/Andre Dopwell in July, 2009 fell short of the total amount due by EC \$193,452.70. (THE CHRONICLE of 20th August, 2010 front page news article captioned "Journalist Claims Bins Refund Not Yet Settled").

Mr. Linton in a Q95.1 programme is reported to have said that this additional sum is to be refunded to the Government because:

- i) 508 bins which Dopwell agreed were "short shipped" were charged for in the original invoice, but were not included in the refund;
- ii) a "finance and management charge of 23.5%" and not "the 10% service charge and other expenses such as freight and assurance(sic)" referred to in Dopwell's letter were imposed on the shipment; and
- iii) the bins were valued in excess of the "know market price," as suggested in Dopwell's letter to the Secretary to the Cabinet.

This matter has become a major talking point in the public media and has generated a 'ground swell of controversy'.

In his 2009 Report to Parliament, the Director of Audit may feel constrained to comment on the issues thereby arising.

DUTIES AND RESPONSIBILITIES OF THE ACCOUNTING OFFICER

The Secretary to the Cabinet and Head of the Public Service as the permanent head of the Department is the accounting officer for the votes concerning this much talked about and debated procurement. The sum of \$749,619.82 was paid from votes of which the Secretary to the Cabinet is designated Accounting Officer. (See Director of Audit Report 2008, page 72) As accounting officer he has a personal responsibility for the proper conduct of the financial business of the Department to which he is appointed. His most obvious duty is to ensure that the public funds entrusted to his care are properly safeguarded. Any dereliction of this duty may cause him to defray the expenditure from his own purse within the limits set under the surcharge provisions in section 44 of the Act of 1994.

As accounting officer he has a duty to do everything in his power to see that the administration of the Department under his constitutional supervision is carried out with efficiency and economy – without waste and extravagance.

In his letter of appointment as Accounting Officer by the Financial Secretary, a document of fundamental statutory importance which defines and promulgates his responsibilities, he is instructed on how to deal with situations where the implementation of ministerial instructions may lead to the “wasteful and extravagant” use of public funds.

DUTY TO SPEND WITH EFFICIENCY AND ECONOMY

The letter from the Financial Secretary to him on his appointment as Accounting Officer advises, materially, as follows:

“9... .. While it is, of course, the duty of an Accounting Officer in the last resort to obey any instructions given by his Minister, it is nonetheless his duty to do everything in his power to see that the administration of the Ministry is carried on with efficiency and economy. He should, therefore, not hesitate to represent his objection to any course of action which he regards as inconsistent with that duty, and to place on record his disagreement with any decision which he may find difficulty in defending, as a measure of prudent administration before the Public Accounts Committee. Having done so, he must nevertheless, if the Minister adheres to his decision, accept it; in which case he should support his defence on the action taken, if need should arise, by reference to a policy ruling given by his Minister”.

The Financial Secretary’s instructions continue:

“10 Alternatively, the matter which is the subject of the Accounting Officer’s protest may be one which involves his personal liability on a question of formal regularity or propriety. In that case he should not only set out his objection to the proposed expenditure and his ground for it, in writing, but he should only make the payment upon written instruction from his Minister overruling the objection. Such instruction should be copied immediately to the Financial Secretary and to the Senior Auditor. Provided that this procedure has been followed, the Public Accounts Committee will no doubt acquit him of any personal responsibility for the expenditure”.

(Schedule 1 to the Financial Regulations, Chap. 63:01)

THE UK APPROACH

United Kingdom jurisprudence on central government expenditure decisions emerging from the recent Pergau Dam Case suggests the principle that spending by the Executive of money voted by Parliament is unlawful if, in relation to the object for which the money has been provided, no reasonable minister could think that the proposed spending represented value for money. (R.V. Secretary of State for Foreign and Commonwealth Affairs ex p. The World Development Movement Ltd [1995] 1 All E.R. 611; and see “Value for money and Administrative Law” by Ian Harden et al [1996] Public Law, 661. The World Development Movement, a non-governmental organization (NGO) was held to have locus standi to litigate this matter underscoring the liberal view being taken by the courts to public-interest adjudication).

ACCOUNTING OFFICER SAYS NO TO ‘BAD SPENDING’

In the Pergau Dam Case the permanent secretary/accounting officer was of the opinion that the use of UK Government funds (from the Aid and Trade Provision (ATP) budget to build the Pergau Dam and hydro-electric power station in Malaysia) was inconsistent with his accounting officer’s responsibility to ensure that funds were administered in a prudent and economic manner and that he would wish to have an instruction from the minister if his department were to incur expenditure on the project. The accounting officer advised that the project “was unequivocally a bad one in economic terms”. In requesting this specific ministerial instruction he was at pains to point out that he “had looked again at the papers to see whether there were any material counter arguments to be set against the clear economic case against the project (but) he saw no serious counter arguments.” He further advised that the project did not “meet well-established criteria by which public investments should be assessed” and therefore was “an abuse of the aid programme in the terms that this is an uneconomic project” nor was it “a sound development project”.

It is suggested that this is the robust quality of professional advice expected of a senior public officer appointed to the office of Accounting Officer in protecting the public purse.

The minister, against that advice, took the decision to approve ATP support for the Pergau project under the Overseas Development and Cooperation Act 1980 and gave appropriate direction to the permanent secretary/accounting officer. In judicial review proceedings initiated by the NGO the court held that the grant of aid funds for a project which was economically unsound did not satisfy the legislative criteria and was unlawful, and granted a declaration that the minister’s decision to grant aid to the Pergau project was unlawful. Significantly, Rose L.J stated: “Where, as here, the contemplated development is, on the evidence, so economically unsound that there is no economic argument in favour of the case, it is not, in my judgment, possible to draw any material distinction between questions of propriety and regularity on the one hand and questions of economy and efficiency of public expenditure on the other”. (Emphasis added)

“IRRATIONAL” PROCUREMENT DECISION?

“When Parliament grants money to government for [a public] purpose it does not authorise it to choose a means of achieving that purpose which is a waste of money”. (See, Harden, I; White,

F; and Hollingsworth, K. “Value for Money and Administrative Law”, [1996] Public Law, 661, 675)

Ian Harden et al, have posited that some spending is such bad value for money that it is unlawful. (op cit)

The empirical evidence (i.e. the Director of Audit’s findings and the quantum of the refund) raises several questions. These include:

- i) Whether the expenditure on this garbage bin procurement contract of 2008 represented value for money?
- ii) Whether the reasons advanced for the use of over \$3/4 million of public money for the purchase of these garbage bins at that time were sufficiently cogent? and
- iii) Whether such expenditure falls within the ambit of the Wednesbury test in public law? (Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation [1948] 1 K. B. 223 where Lord Greene MR gave the classical review of the circumstances in which the courts will intervene to quash as being illegal the exercise of administrative discretion. In AG of St. Lucia v. Kenny Anthony (Civ App. No. 31 of 2009, June 14, 2010, CA – St. Lucia) the Cabinet decided to grant duty-free concessions to a sitting Minister for his private dwelling house, a “3 bedroom 3 bathroom villa”, under the Tourism Incentives Act 1996. This matter became “a major talking point in the public media in St. Lucia and had generated a ground swell of controversy”. (para. 10). The decision of the trial judge, Cottle J. to quash the Cabinet Decision as having been made without any reasonable basis was sustained. The Court of Appeal held that the Cabinet Decision was irrational in the Wednesbury sense. The Court stated that the Cabinet had “important fiduciary duties to the citizens of the country. It cannot make decisions that result in reducing the revenue that the Government is entitled to collect in an arbitrary and cavalier manner, especially where the decision benefits one of its own members... On any view of the evidence the decision is so outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the decision that the Cabinet made on June 2008. The decision was simply devoid of any rational basis”. (Per. Webster, J.A. (Ag) para. 61) (Emphasis added).

A departmental minister pursuant to the section 68 general power under the Constitution may do many things without any specific statutory authorization. One of the things he cannot do consistent with the financial administration laws, however, is actually pay any money out of public funds, without more. This is the responsibility of the accounting officer – the permanent head of the Department. Where, therefore, a minister has planned a course of action (non-competitive procurement of stores at prices which appear to be neither fair nor reasonable, for example) which relates to the accounting officer’s statutory responsibility for economy over the purchase of stores, the accounting officer is under a statutory duty to place his objection on record, seek legal advice on its legality and draw all the relevant considerations and statutes to the immediate attention of the minister. No information is in the public domain as to whether the Accounting Officer found it appropriate to so advise the Minister.

The accounting officer has responsibilities both to the Minister and to Parliament – via the Public Accounts Committee. And he is required to fulfill these responsibilities in accordance with the legal and regulatory framework governing the administration of public finance in the Commonwealth of Dominica.

The Financial Secretary is authorized under section 45 of the Finance (Administration) Act 1994 to investigate “the circumstances” to determine whether a section 44 contravention has arisen.

The Act of 1994 and the Audit Act mandate that Government spending must reflect value for money. Parliament commands it. The rule of law demands it. Accountable government requires it. The Director of Audit emphasized it. As Dicey in his seminal work noted: the legality of central Government expenditure is not just a matter of the rule of law but of the maintenance of accountable Government. (Dicey, A.V, “Introduction to the study of the Law of the Constitution” (10th edition, 1959) Chap. X, cited in Ian Harden et al, op. cit).

Government spending must reflect the highest standards of probity, integrity and value for money.

CONCLUSION

The conclusion, at this stage, only addresses procedural matters relating to the actions of the authorities overseeing public expenditure:

- i. the Financial Secretary based on the Director of Audit Report(s) and any explanation furnished by the Accounting Officer is required by the Act of 1994 to determine whether the circumstances give rise to action under sections 44 and 45 of the Act for contravention of the provisions of the Finance (Stores) Regulations in the purchase of the garbage bins;
- ii. the Director of Audit, under the Audit Act, is expected to call Parliament’s attention to the shortfall of at least \$132,000 in the refund to be made to the Consolidated Fund as highlighted in his 2008 Report;
- iii. the Public Accounts Committee (chaired by the Leader of the Opposition by convention) should continue its hearings (in public in keeping with “the usage and practice of the House of Commons”?) into the Director of Audit’s Report of 2008 and 2009 (when laid in Parliament) and the quantum of refund due in this matter and to report to the House of Assembly accordingly; and
- iv. Judicial review of the decision to purchase those garbage bins on the grounds that it was irrational in the Wednesbury sense, falls to be considered.

Julian N. Johnson

30th September, 2010