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Report to the Finance Strategic Policy Committee
Ballyfermot Leisure Centre

The City Council contracted with Ferrovial Limited in 2004 to construct a leisure centre at Ballyfermot. The tender was in the sum of €18.2 million (including VAT). The project was publicly tendered with a full Bill of Quantities, design drawings and specifications. The facility was built as designed to include a 25 meter swimming pool, a gym, a sports hall, 6 five aside all weather pitches, fitness studios, toilets and changing areas. The contract timeline was 1/11/04 to 15/7/06. The project was completed in 2008. Ferrovial were slow to commence the contract and in due course a number of issues arose in the course of the construction project. Ferrovial were of the view that the problems were the responsibility of Dublin City Council but the Council did not agree with that. As a result, the dispute resolution mechanism in the contract was initiated.

On completion Ferrovial submitted a claim for €37m over and above the contract figure, under the provisions of the conciliation and arbitration provisions as provided in the contract. This claim was made under the following headings – variations, delays, disruption and increased costs. The City Council submitted a counter claim for €6.2m, a large element of this claim related to tiling defects in the swimming pool and the consequential loss of revenue whilst the swimming pool was closed for repairs and the remedial works to the 6 all weather pitches and fencing.

In 2010 both parties engaged in a conciliation process. This process did not resolve the issues and the matter progressed to arbitration in accordance with the contract.

In 2011 an Arbitrator was appointed and an Arbitration process commenced. The Arbitration process was divided into separate hearing modules

1. The Variation claims
2. The Counter claim by Dublin City Council
3. The Delay and Disruption and Loss and Damage claim by Ferrovial.

Initially Ferrovial were seeking approximately €37 million in damages which they reduced to €27 million plus VAT prior to the first Arbitration hearing in July 2015. The Arbitration process was very slow and initially there were legal issues to be resolved before the claims were investigated by the Arbitrator.

Hearings commenced in July 2015 into the initial aspect of the claim, the variations. Progress was slow due to the complexity of the claim (over 20,000 pages of supporting documentation submitted). The first hearings of the Arbitration process lasted 4 weeks and dealt with the first 7 Variation claims. Dublin City Council were successful in defending one of the claims and reduced the quantum by 60% in the other claims which were finalised at this session (a further 12 variation claims were also settled at this time).

In October 2015 a further 10 Variation claims were heard but were not determined pending further submissions from Dublin City Council (at this time a further 8 Variation claims were settled).

Eventually in 2015 the Arbitrator made some awards in respect of some of the matters that had been brought before him. He issued further awards in early 2016. As set out above, the situation was that the Council was only completely successful in one of those claims. However, in respect of the overall issues that were brought before him, while the Council was not entirely successful, nonetheless it succeeded in having the quantum claimed by the contractor reduced by 60%. However the consequence of this is that the Council would be unlikely to be awarded its costs for defending those claims. This had a significant bearing on the decision by the Council to settle the case at this point.

Another deciding factor was that the Council had a counter-claim for bad workmanship in relation to tiling of the pool area and fencing in the pitches. On examining the evidence available to the Council to bring those claims, it was felt that the Council might have some difficulties in proceeding with the counter-claim from an evidential view point.

In 2016 the Council looked at the expenditure it had incurred in defending the cases and made a decision to try and negotiate a settlement with Ferrovial. It eventually succeeded in doing so by paying €5 million plus VAT in settlement of the claims and €8 million as a contribution towards Ferrovial's costs.

The reason the costs were so high on both sides is that there were a number of expert witnesses required to deal with the matters raised in the Arbitration e.g. tiling experts, architects, engineers, quantity surveyors etc. In Arbitration it is also necessary to pay the Arbitrator so overall it was a very expensive process and of course the Council had to pay both Senior and Junior Counsel for their part in the case.

The Council sought the advice of James Connolly SC in relation to the settlement proposal and he concluded that the settlement was in the best interests of the City Council.

It is to be hoped that a scenario such as this would not occur in the future. To that end the Construction Contract Act 2013 now applies to all construction contracts entered into after the 25th July 2016. It applies to all traditional construction contracts and sub-contracts. The situation now is that when a payment falls due under a contract and the employer disputes the amount due, he must do so within 21 days. If the parties cannot agree on a figure it goes to an independent adjudicator. The decision of the adjudicator is binding unless and until it is overturned by arbitration or the courts. Payment must be made up front despite referral to either an arbitrator or to a court. There are tight time-lines for decisions to be made etc.

This system works very well in the U.K. and it has all but put an end to lengthy and expensive arbitration proceedings and also court proceedings. It is hoped that it will have a similar affect and be as successful in Ireland.

To change the dispute mechanism provided for in construction contracts is something which is dealt with by the Office of Government Procurement and cannot be undertaken unilaterally by Dublin City Council.

There has also been a change in the type of contracts that are now used: Circular 01/16 - Construction Procurement Revision of Arrangements for the Procurement of Public Works Projects.

The lead-in time for using these forms has now expired and from the 9th January 2017 it is mandatory to use them. The main areas of change brought about by these forms are as follows:

- The pricing document on the employer designed contract forms (PW-CF1, PW-CF3 and PW-CF5). These must be a fully measured bill of quantities to an approved defined method of measurement. Inconsistencies between the pricing document and works requirements will be a compensation event in favour of the contractor.

- A new procedure whereby the contracting authority may separately directly tender specialist works sub-contractors who are to be appointed by the contractor.

- New dispute resolution procedures:
  - A project board for projects greater than €5 million;
  - A standing Conciliator for projects with a value in excess of €10 million.

It is clear from the above that the way in which claims will be dealt with from here on in is substantially different to the way in which this particular matter was dealt with. It is hoped that the new mechanism will prove much more effective and in particular that it will be much more cost effective and expeditious.

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