

VOTE 21. - PRISONS

17. Capital Projects

Capital projects at prisons are carried out on occasions on behalf of the Department of Justice Equality and Law Reform by the Office of Public Works (OPW). Each year I review a sample of capital projects so as to satisfy myself that contracting authorities adhere to public procedures for managing capital projects. In this regard, the sample includes projects which have just commenced, are ongoing, or have been completed. The final payments on a completed contract may not arise for some period after the project has been completed. However, if in the course of my review I note that there are matters which may have ongoing implications for the way projects are managed, I may deem it necessary to include a reference to them in my report, even though the project had been completed some years previously. Two such projects are outlined in the following paragraphs.

18. Castlerea Prison Perimeter Wall

The original cost estimate of the Perimeter Wall project at Castlerea prison prepared during the design stage in February 1994 was £3.57m while a second cost estimate prepared in April 1994 was £2.5m. Tenders were to be sought from 9 contractors short-listed from 46 firms who had declared their interest in the project. The Government did not agree to this restrictive tender approach and decided that an open tender competition be held.

Following receipt of 36 tenders the lowest one in the sum of £1.18m was accepted in May 1994. The successful tenderer had been declared as unsuitable when the original short listing assessment was carried out.

The completed contract price came to £1.2m and the project was completed in 1995.

In response to my inquiry as to why the cost estimates were so significantly higher than the contract price, the Accounting Officer of OPW stated that the estimates were guided by the cost of the Wheatfield Prison Wall, which although similar, was constructed differently but which was the only like project undertaken by the OPW in the modern era. The disparity between the estimate and the lowest bid reflects the keenness of the tender competition, and in particular the pricing approach adopted by the lowest bidder who, to quote the quantity surveyor's tender report "has adopted a keen price and risk taking method".

As to why a restricted tendering procedure was considered by the OPW to be appropriate in this case, the Accounting Officer stated that the tendering procedure to be used depends on the particular circumstances pertaining to the project. In this instance the size of the project and the nature of the work (i.e. on a security installation) restrictive tendering was appropriate. The Department of Justice Equality and Law Reform concurred with this view.

In the light of experience of this project, I inquired whether criteria for using restricted tendering have been revised to ensure that optimum value for money is achieved in the awarding of contracts. The Accounting Officer informed me that the OPW holds the view that the use of restricted tendering does not inhibit the achievement of optimum value for money. In addition, the existing criteria for using restricted tendering in the prisons context are not solely concerned with economic considerations (although they naturally form a large part) but also deal with issues particular to the security aspects of such projects.

19. Castlereia Prison Project

A design and build contract is one where the building client contracts with a developer/contractor to purchase a building complete in every respect and suitable for the intended purpose, at a fixed price. So as to ensure that design and build contracts are successful from an economic and cost control perspective it is vital that the outline design and specifications for such projects are clearly defined before tenders are sought so as to ensure that changes and/or additional works do not arise once the contract is awarded. However, during audit I noted that the Castlereia Prison design and build project which was contracted to cost £12.7m was completed at a cost of £14.34m.

In March 1994, the Government decided to provide accommodation for 150 male prisoners in Castlereia. The project involved the conversion of the existing hospital building to use as a prison and the construction of some new buildings. It was also agreed that the design and build method of procurement should be used for this project.

During 1994, the Office of Public Works (OPW), acting as contracting agent for the Department of Justice, Equality and Law Reform (Department), invited 19 contractors to apply for inclusion in the pre-qualifying process. Fourteen positive responses were received and, following assessment by OPW, were ranked in order of merit. In March 1995, tender documents were issued by OPW to 7 firms as:

- 4 had been ranked as highly suitable
- 1 had previous involvement in prison work
- 1 had previous experience of design and build developments and was located in the area
- 1, though ranked 13th in the order of merit, had a design team on board who had experience of prison work in the UK and was classed as a "wild card".

Following discussion with the Construction Industry Federation, OPW reduced the list of invitees from 7 to 4 but no tenders were received as, in June 1995, the Government decided to defer the project. In March 1996, the Department requested OPW to revise the project to effect cost savings, to reduce the prison accommodation from 150 to 120 and to construct a less elaborate prison within the budget of £12-13m.

Tender documents were re-issued in November 1996 to the 4 firms previously selected by OPW and four tenders were received, ranging from £11m (by the firm previously ranked 13th out of 14) to £23.5m. The tender documents issued to the firms included a design brief indicating the extent of the work to be carried out and the costs to be covered in the tender proposal.

Following review by OPW, the lowest tender was increased to £12.7m to adjust for an error of £200,000, the inclusion of VAT at £1.38m and the provision of a bond at a cost of £75,000. It was also agreed that payment of £250,000 to the local authority for a sewerage connection would be paid by the Department, even though the tender documents issued to the four firms required its inclusion.

It was further proposed by the tenderer, prior to the execution of the contract in January 1997, to substitute precast concrete for concrete block work (as proposed by OPW) in the construction of cell walls as this would provide an additional 12 cells. The proposal was accepted, at an extra cost of £247,500, the work to be carried out under a separate contract.

The project was completed in 1998 and the full cost came to £14.34m comprising

£m

12.70	Design and Build contract
0.22	Sewerage Connection
0.25	Extra spaces as a result of change in cell block construction
1.17	Additional costs after work commenced.

In reply to my inquiry as to whether the assessment of contractors was satisfactory given that the contractor who was eventually successful was ranked 13th out of 14 in the order of merit, before being included in the short list of 4 who were invited to tender, the Accounting Officer informed me that:

- The OPW have informed him that it is considered that the assessment procedure was satisfactory, given the factors applying at the time. The assessment was based on information and data supplied, on request, by the candidates and which was current and valid at the time the evaluation was carried out. The criteria employed were also considered directly appropriate to this particular project, given the procurement method proposed.
- The placing achieved by the successful contractor following the assessment process did not necessarily reflect adversely on either that particular contractor or the assessment method used. The assessment did not, for example, conclude that this contractor, (or indeed any of the other candidate contractors), was incapable of carrying out the work, but merely said that, on an objective analysis based on the requirements of the project, the information supplied by candidates, the accepted criteria employed to evaluate that data and the OPW's own knowledge of the firm in question, this was the appropriate rating.
- It should be noted that the successful contractor for the project had already tendered and completed successfully the construction of the prison wall at Castlereah, at a very competitive price. (see paragraph 18).

As a design and build contract should include all costs to provide a suitable prison building, I inquired as to why the proposed sewerage connection estimated at £250,000 and the additional spaces costing £247,500 were not included in the tender proposals received from the successful applicant. In this regard I noted that the contractor expressly excluded any local authority charges from his tender bid price contrary to the tender document requirement.

The Accounting Officer informed me that:

- The sewerage scheme as originally designed and tendered for envisaged that there would not be a need for onsite sewerage treatment. The preferred option in dealing with this matter was to connect directly to the public system and this was the solution pursued by OPW. The existing public system did not have the capacity to deal with the volume of effluent from the proposed Prison so this option was not feasible. However, following discussions with the local authority and the Department of the Environment and Local Government, the Department and OPW became aware that there was a proposal, by Roscommon County Council, to construct a new public town sewerage scheme for Castlereah and in that context, it was logical that provision should be made to allow the County Council to connect the Prison directly into this new scheme and thus obviate the need for any arrangements to be made within the contract to

deal with this item. An agreement was reached between the County Council and the Department that the cost, to the Department, of this connection and associated works would be £250,000. This would have had the dual benefit of removing a significant element of work from the project and also ensuring that there would not be a need to provide for a continuing expense in future years in maintaining sewerage plant on site. The County Council had no difficulty with this proposal and consented to allow the direct connection to be put in place.

- As the project progressed through the construction phase however, it became apparent that, contrary to previous indications the new public scheme proposed for Castlereagh was not, in fact, likely to be provided in the timescale previously indicated. The Department of the Environment and Local Government confirmed this to the Department as the contract for the Prison was nearing completion. In this context, the Department was obliged to make separate arrangements for the treatment of sewage. An onsite solution was eventually adopted, since neither of the "public" options was then feasible. The Department following a separate tender competition entered into a separate contract with a different contractor to install a suitable modern sewerage treatment plant exclusively for the prison at a cost of £220,227.
- The proposal to provide additional spaces was not made by the contractor in his tender because his price was based strictly on the tender documentation supplied. The proposal was made separately, later, on his own initiative and was specifically approved by the Inter-Departmental Committee (Departments of Justice, Finance and OPW) overseeing the Accelerated Prison Programme on the basis that it represented good value for money and should therefore be availed of.

In reply to my inquiry as to why £1.17m additional costs arose following the award of the design and build contract the Accounting Officer stated that these arose in order to deal with new requirements arising since the original design and matters which could not have been foreseen at the outset but which were necessary for the proper completion of the works. These included:

- £768,000 for the inclusion of Palmreaders and Audio Visual Units on doors and gates, the provision of fibre optic cabling between blocks, variations to doors and additional fencing. As the project developed, the Department became aware of the use of Palmreaders and Audio-Visual Units to gates and doors in prisons in Northern Ireland and the UK, where they proved to be very effective and cost-cutting. The installation of these devices in Castlereagh has achieved staff savings in the region of 20 staff posts at a saving of £380,000 per annum. This will result in substantial savings over the coming years. The variation on the doors, the fibre optic cabling, additional fencing and other works were items which were identified during the construction period and were necessary for the proper completion of the works and the smooth running of the prison.
- £181,000 for sundry work including £78,500 for a water softening system. The water softening system was recommended by the technical engineers to prevent the build up of limescale on all the hot water equipment, which would have caused difficulties to the smooth operation of a working prison. The other principal items of expenditure were the provision of service ducts between Block B and the south west gatelock and the provision of firehose reels and enclosures. These were essential items which were required for the prison.
- £114,000 to construct a surface water drain. *(Though the tender documents issued to the four firms required the inclusion of such a drainage system in the tender price, I noted that the contractor specifically excluded provision for this in his successful tender proposal).* Towards the end of the contract, it became

apparent that a scheme of works would be required to rectify a problem which was then becoming apparent in relation to the system of surface water drainage. Historically, since the former hospital had been constructed, the surface and foul water systems had fed into one unified sewerage treatment plant. The system then in place was designed to cope with this. However, when the new prison sewerage system was constructed, it became apparent that this method of mixing foul and surface water would not be possible, since the more modern system proposed required that the two "feeds" could not be mixed. For this reason, it was necessary to put a project in place to separate the two and provide a separate outfall for the surface water, since it would, if it continued to drain into the sewerage system, interfere with the efficient operation of the sewerage system. The scheme of works to give effect to this proposal was put out to tender and was awarded, after competition, to the on site contractor.

- £55,000 for securing and making good the west wing. During the course of the contract, the contractor used the former hospital west wing as his base of operations/site office. This meant that he did not have to set up temporary site office accommodation and thus avoided incurring costs (which would ultimately have had to be borne by the Department under the contract). Since the building had up to recently been occupied, a minimum of work was necessary to bring it up to an acceptable standard. No specific prison related use had been established for the building by the time the contract had been completed and the contractor vacated the site. In the interim, until a final decision was made on the long term use to which the premises would be put, it was decided that, in order to prevent the building from falling into disrepair, a scheme of works should be put in place which would weatherproof the premises and establish a stable environment so that the building fabric would not deteriorate. This was especially relevant given the onset of winter when, unprotected, the building might have been vulnerable to frost and rain damage in particular. The contractor on site was awarded the contract for the works required after a competitive tender process and the necessary protection was duly applied to the building so that it could remain in relatively good condition pending a decision as to its future.
- £48,000 for a water main which was a requirement made by Roscommon County Council. The works included the extension and diversion of the water main with appropriate connections and junctions, as well as a 100mm spare duct in one of the trenches for future use.

The Accounting Officer also stated that consideration should be given to the fact that this was the Department's first experience of a design and build project. Because of the experience gained through this project, he has ensured that on current design and build projects underway there is a greater involvement of the Department's technical staff at all stages of the project. This leads to more cost effective and smooth running of the contract.

20. Compensation

In June 1998, the High Court at a sitting in Ennis awarded £796,654 plus costs, against the State in special and general damages on foot of a personal injuries case brought by a former prison officer following an accident at work in 1995. At the opening of the trial, the plaintiff made an offer to settle on £300,000, plus costs. However, despite the repeated advice of its Senior Counsel to accept this offer, the Department refused to concede liability and, on the advice of the Attorney General, responded with its own offer of less than £200,000. The offer was rejected by the plaintiff and the Department conceded liability on the third day of the trial. Following the High Court award the Department and the Attorney General considered an appeal to the Supreme Court but following negotiations between the plaintiff and the Attorney General a settlement of £550,000, plus plaintiff's costs of £150,182 was agreed in July 1998. As the State costs came to £37,790 the overall cost of this case was £737,972.

The following matters were noted during audit review of the case:

- The Senior Counsel for the State had advised on every occasion that he was consulted before and during the trial that, on the basis of the evidence available to him, the court was very likely to find in favour of the plaintiff, damages were likely to be substantial and settlement on the best terms should be considered.
- There were no defence witnesses in court who could contradict the plaintiff's statements on the circumstances of the accident, nor was there any evidence to contradict the charge of negligence on the part of the State. The defence evidence which was available tended to support the plaintiff's case.
- There was no medical evidence available to the defence which could challenge the plaintiff's evidence in relation to injuries suffered as a result of the accident, or which could challenge his claim for damages. The medical expert retained on behalf of the defence was not present in court. The defence rehabilitation expert, who was present, advised that he could not contradict the plaintiff's claim that he would never be employed again in any capacity.
- Counsel's initial damages estimate of £150,000 was revised to £300,000 days before trial, but was qualified by his statement that he still did not have any proper information on the plaintiff's loss of income to date, what he would be earning if still employed, or the capital value of his loss of earnings into the future. He reiterated his advice that the State was likely to lose the case and warned that the Department's termination of the plaintiff's employment some nine months previously on grounds of permanent ill health, of which he had just been informed, would have a disastrous effect on damages, particularly his claim for loss of earnings into the future.
- The plaintiff's claim for special damages was based on an actuarial report on loss of income, which, together with the evidence of the plaintiff's actuary, was accepted by the court as providing the basis for the special damages award of £496,654. An actuarial report was provided for the State just before trial but, according to the Senior Counsel, it did not differ in any significant way from that of the plaintiff. The defence actuary was not present in court. The Senior Counsel advised that he did not have and was not given any instruction, information, material or witnesses which would have enabled him to present any challenge in court to the plaintiff's claim.

- The Senior Counsel concluded that the true extent of the plaintiff's condition was not appreciated by the Department and the Attorney General's Office.

As it appeared that the failure to prepare adequately for the case, to assess its full implications and to disregard its Senior Counsel's repeated advice to settle the case when the opportunity to do so was available resulted in significant additional costs for the State, I sought the views of the Accounting Officers of the Department and of the Attorney General's Office.

The Accounting Officer of the Department of Justice, Equality and Law Reform informed me that:

- Though the Senior Counsel had advised at an early stage that a Court was very likely to find in favour of the plaintiff, this was not accepted by the Department as there were areas of concern in relation to some aspects of the case, principally regarding the circumstances of the accident.
- The attendance by and reports of expert witness were a matter for the Office of the Chief State Solicitor (CSSO).
- On Thursday 18 June 1998 the Attorney General requested the Chief State Solicitor to obtain a settlement figure from Counsel and to see about settling the case. On Monday 22 June 1998 the Department was advised by the CSSO that Counsel said that plaintiff's Counsel was looking for £500,000 but might settle for £300,000. The CSSO also said that the Attorney General was not in favour of settling for £300,000. In the absence of the agreement of the Attorney General it was not open to the Department to agree a settlement.
- The State's Senior Counsel contacted the Department directly on Tuesday 23 June 1998, the first day of the trial. He said that due to the plaintiff's condition he would get well in excess of £300,000, possibly £400,000 and that there might be contributory negligence of 25%, but he was not sure. Counsel said that the State would definitely fail on liability. With the agreement of the Attorney General's Office an offer to settle up to £200,000 was made on Wednesday 24 June 1998. The Attorney General advised, *via* the CSSO, later that day to concede liability (in order to prevent an escalation of legal costs), thus leaving it to the Court to assess damages. At all stages the advice of the CSSO and the Attorney General's Office was followed.
- It should be noted that the award of the Court was considerably in excess of the highest estimate from the State's Counsel. In addition, the Counsel's views on the question of an appeal were not accepted by the Attorney General. By following the advice of the Attorney General a reduction of £246,654 was achieved on the High Court award of £796,654, whereas the Counsel's advice was that a reduction of less than £150,000 was likely.

The Accounting Officer of the Office of the Attorney General stated that:

- The information about the termination of the plaintiff's employment on medical grounds and the actuarial and medical reports on the case were only received by his office just before the case commenced. The rehabilitation evidence and the Prison Governor's report on the plaintiff and the veracity of his claim only became available on the day of the hearing. The last minute provision of information and the lack of communication from the local State Solicitor on how the case was faring meant that those in a position to sanction a settlement were not up to date with the dramatic escalation in the value put on the case.

- Liability is kept as an issue in a case for tactical reasons. It is the recollection of the Attorney General's Office that it advised the Department *via* the CSSO on the day before the trial (22 June 1998) that liability should be conceded. The advice was given at the same time that an offer of £180,000 was suggested.
- The time available to settle the case for a sum of £300,000 was brief. The late delivery of information and the lack of communication meant that the Department had only a short time to obtain sanction. This also meant that those responsible for sanctioning a settlement were not aware of the impact the plaintiff's evidence was having in Court. There was no appreciation of why the settlement figure could move so dramatically from £200,000 to £450,000 in the same day.
- The two areas of difficulty - the late delivery of information by the Department and the failure of the local State Solicitor to communicate information - were discussed at a meeting held in the wake of this case which was attended by representatives from the Office of the Attorney General and the CSSO. Proposals were discussed as to how procedures in these two areas could be improved. However, the proposal to establish a claims agency has since been developed. The deficiencies identified by this case will need to be tackled by the new Agency. In particular the Agency will need someone with the authority to sanction settlement available at pre-trial consultations and during the hearing of the case to give a speedy response to any settlement proposal.

He also stated that:

- Neither the defendants nor the plaintiff in this case appreciated how great an award the judge was prepared to make.
- The award was based on the favourable impact which the plaintiff made on the Court in giving evidence. The impact of a witness in a case is unpredictable and can only be taken into account as the case progresses. In general there is nothing to suggest that a settlement is always more favourable to a defendant than a judge's evaluation in a case.
- The medical expert retained on behalf of the State was not present in court and Senior Counsel did not (as in the opinion of the Office of the Attorney General he should have done) seek instructions as to whether to proceed or to seek an adjournment of the case. The view of the Senior Counsel on the medical evidence is not shared by the Attorney General's Office.
- Senior Counsel's advice on the offer which should be made was couched in very vague terms which were difficult to act on. Nor was it clear from his advice what new information or evidence had changed so as to alter Counsel's original advice which set a figure of £150,000 as the full value of the case. The difficulty could have been remedied by having someone on the ground at pre-trial consultations who would be aware of all the last minute detail emerging. This is the function of the local State Solicitor. Because of the Department's failure to have someone present in Ennis court and the failure of the local State Solicitor to make contact with officials in Dublin it may be understandable why these officials did not understand why the figures were changing so rapidly.
- It is the opinion of the Office of the Attorney General that the amount in fact awarded by the Judge was excessive. This is borne out by the fact the case was settled for much less before the Supreme Court appeal.