



Comhshaol, Pobal agus Rialtas Áitiúil
Environment, Community and Local Government

Oifig an Ard Rúnaí
Office of the Secretary General

6 March 2012

Ms Eimear Lavelle
Committee Secretariat
Public Accounts Committee
Leinster House
Dublin 2

Eyre Square Enhancement Scheme

Dear Ms Lavelle,

I refer to your letter of 14 November 2011 in relation to the Eyre Square Enhancement Scheme requesting a note on the issues raised in the development of the project. This note is now annexed for the information of the Committee.

Yours sincerely,

Geraldine Tallon,
Secretary General.



**Note for the information of the Public Accounts Committee
Eyre Square Enhancement Scheme**

Overview and role of the Department

Under the Urban & Village Renewal Measure of the *Regional Operational Programmes, 2000-2006* local authorities could apply for EU co-financed grant assistance in respect of regeneration projects in cities, towns and villages.

In May 2001, Galway City Council submitted a strategic plan entailing three regeneration projects for the period 2000-2006, the most significant of which was an Eyre Square enhancement project. The Council's strategic plan was approved in principle by the Department in July 2001.

In the period December 2001 to September 2006, the Department paid a total of €4.572 million to Galway City Council in respect of the Eyre Square project. (This represented an aid rate of 92% of eligible expenditure; under the relevant scheme, Councils met the remaining 8% from their own resources). In light of the increased project costs, the Council requested an increase in its grant allocation under the Urban and Village Renewal Scheme. However, the Council was informed at the outset that, as is the case with all other grant-aided projects, any ineligible or excess expenditure on a project has to be met by the local authority concerned. Accordingly, additional grant assistance over and above the original allocation under the programme was not provided in this case. The Department has not had any further involvement in the funding of the costs of this scheme.

In the context of the statutory audit of the Council's 2010 financial accounts, the Local Government Audit Service examined the City Council's files concerning the Eyre Square project.

By way of assistance to the Committee, the chronology of events, as known to the Department, is set out below.

Background

A tendering process for the Eyre Square project commenced in June 2003, following which Samuel Kingston Construction Ltd. (SKCL) was appointed by Galway City Council, having regard to a range of factors, including price, capacity to undertake the contract, compliance with legal requirements and a track record in dealing with work of this nature.

A contract between the City Council and the contractor was agreed in January 2004 and was signed on 5 April 2004. The duration for the works was set at 18 months. The total contract value

was €6,362,388 (inclusive of VAT). A completion bond to the value of 15% of the contract (€954,359) was put in place by SKCL.

The work was due to be completed in August 2005. In accordance with contract conditions, a programme of works was put in place setting out in detail the various elements of the project and the timescales for completion of same. The Council's consultants and project engineer held weekly and fortnightly meetings on site with SKCL from the commencement date.

As is not uncommon under construction contracts, and particularly so in respect of complex projects on "brownfield" sites, delays occurred which were not necessarily the responsibility of the contractor. Requests from SKCL for extensions of time were examined and assessed by the Council and in total an additional fifty-one days were granted bringing the new completion date to October 2005.

However, as the contract proceeded the Council developed concerns at the overall pace of work. Under the terms of the contract two notices were served on SKCL, the first on 3 September 2004 and the second on 9 February 2005, requiring the company to increase the resources deployed on site so as to accelerate the redevelopment.

On 27 June 2005 SKCL abandoned the site without notice. The total amount paid by the Council to SKCL to that date was approximately €3.73 million. It was estimated that approximately 70% of the contracted work had been completed.

Subsequently, the Council reverted to the three remaining contractors short-listed in the initial tendering process and invited them to indicate their interest in completing the project. Following assessment of subsequent tenders and detailed negotiations, the Council appointed SIAC Construction Ltd. to complete the project, at a contract fee of €4.8m. Work on the site recommenced in October 2005 with a revised completion date of end-March 2006. Work was completed in April 2006 and Eyre Square was formally re-opened in May 2006.

Legal action/arbitration

Galway City Council pursued SKCL for breach of contract and made a claim on the completion bond of €954,359, in accordance with the terms of the contract. Following an unsuccessful conciliation process, an arbitrator was appointed in July 2006.

Galway City Council Position

The Council argued to the arbitration hearing that the contractor (SKCL) had withdrawn from the contract when they left the site in June 2005. The Council had entered into a contract with SKCL in February 2004 to redevelop the Eyre Square site. Various problems arose with the works and delays occurred; the Council gave extensions to the contractor. A verbal agreement to accelerate the resources being used to complete the contract was entered into by the Council and SKCL in

March/April 2005. The Council felt that the agreement was not being honoured. Disagreements arose as to the content of the verbal agreement.

SKCL position

The engineer appointed by the Council to oversee the project withdrew a certificate for monies paid on 4 June 2005. This was deemed by the arbitrator and subsequently the High Court to be an error. SKCL argued that the withdrawal of the certificate left them in a position where they were insolvent and had no option but to withdraw from the site.

SKCL's argument was accepted by the arbitrator and subsequently by the High Court and was the primary reason for the arbitrator and the court's finding in favour of SKCL. Following the decision of the arbitrator, the Council applied to the High Court for the removal of the arbitrator and to have the decision of the arbitrator overturned/an appointment made of an alternative arbitrator.

The Court agreed with the decision of the arbitrator and found that the actions of the Council left the contractor with no option but to withdraw from the site. The Court found that the actions of the Council were premature: the contract had a further five months to run and, if negotiations were continued between the Council and the contractor, it considered that an agreement may have been possible.

The award

In his award, the arbitrator found that there was an Acceleration Agreement which took effect from 8 March, 2005, and which was repudiated by the Council with the wrongful withdrawal of funds in Certificate No. 16 on 4 June, 2005. He further found that the wrongful withdrawal of funds directly resulted in the withdrawal of SKCL's overdraft facility by their lender and left the company at risk of trading while insolvent if it continued with the works. The arbitrator also found, however, that the Council's actions of 4 June 2005 did not repudiate the original contract (only the Acceleration Agreement).

Furthermore, although SKCL's withdrawal from the site on 27 June 2005 was a breach of this contract, the arbitrator determined that this was not a fundamental breach or repudiation. The arbitrator also found that while the Engineers Certificate of withdrawal was procedurally correct the Council's overall conduct was unreasonable within the meaning of the contract.

Supreme Court

The City Council appealed the ruling to the Supreme Court. In its judgment the Supreme Court outlined its concerns arising from the failure by the arbitrator to hear from the expert advisory witness retained by the Council. This witness had prepared a detailed report on the delays that arose during the Eyre Square work but the arbitrator made rulings on this delay without calling the expert witness or without his report. According to the Supreme Court this rendered the arbitrator's ruling so far removed from basic procedural fairness that the decision had to be set aside. The

Supreme Court also ruled that the decision of the arbitrator that SKCL's abandoning of the site was a non-repudiatory breach of the contract was an error in law.

In terms of the options remaining to the parties to the dispute, the Court stated that:

"if in the light of this determination the parties cannot themselves resolve this long running dispute, then the arbitration will have to proceed before a new arbitrator".

Final outcome

The case has been settled through mediation. Galway City Council have advised the Department that the principal terms of the settlement are that:-

1. SKCL and the Council have agreed to mutually withdraw their claims and counter claims and treat them as struck out,
2. the Council has agreed to withdraw its claim against the Contract Bond and agrees to the release of the Bond,
3. SKCL has agreed to pay the Council the sum of €150,000 as a final discharge of liability that SKCL may have to the Council,
4. the settlement is based on no admission of liability by either party.

The evidence available to the Council is that the contractor is no longer trading; this limits the extent to which any arbitrator's award in favour of the Council could be recovered from SKCL. The legal costs for the Council are estimated at €1.5m.