



Northern Ireland Audit Office

# Department for Regional Development – Archaeological Claims Settlement



REPORT BY THE COMPTROLLER AND AUDITOR GENERAL  
3 December 2013





Northern Ireland Audit Office

Department for  
Regional Development –  
Archaeological Claims  
Settlement

Published 3 December 2013



This report has been prepared under Article 8 of the Audit (Northern Ireland) Order 1987 for presentation to the Northern Ireland Assembly in accordance with Article 11 of that Order.

K J Donnelly

Northern Ireland Audit Office

Comptroller and Auditor General

3 December 2013

The Comptroller and Auditor General is the head of the Northern Ireland Audit Office employing some 145 staff. He, and the Northern Ireland Audit Office are totally independent of Government. He certifies the accounts of all Government Departments and a wide range of other public sector bodies; and he has statutory authority to report to the Assembly on the economy, efficiency and effectiveness with which departments and other bodies have used their resources.

For further information about the Northern Ireland Audit Office please contact:

Northern Ireland Audit Office  
106 University Street  
BELFAST  
BT7 1EU

Tel: 028 9025 1100  
email: [info@niauditoffice.gov.uk](mailto:info@niauditoffice.gov.uk)  
website: **[www.niauditoffice.gov.uk](http://www.niauditoffice.gov.uk)**

© Northern Ireland Audit Office 2013



# Contents

	Page
<b>Part One:</b>	
<b>Introduction and Background</b>	<b>1</b>
Scope of Study	4
Main Conclusions	4
Value for money conclusion and main recommendations	4
<b>Part Two:</b>	
<b>Minimising the risk of the dispute</b>	<b>7</b>
Roads Service pre-contractual responsibilities	8
Contractor responsibilities	9
Contractor raises dispute over ‘unforeseeable archaeological features’	9
Conclusion	12
Current developments	13
<b>Part Three:</b>	
<b>Managing the dispute resolution process</b>	<b>15</b>
The choice of resolution process	16
Selection of the Mediator	17
The mediation process	17
The settlement	18
Approval for settlement payment	20
The A32 Cherrymount Link Road construction contract	21
<b>Appendices:</b>	<b>23</b>
<b>Appendix 1</b>	
<b>Summary of Contractor and Roads Service submissions to the Mediator</b>	<b>24</b>
<b>NIAO Reports 2012 and 2013</b>	<b>27</b>

---

# Abbreviations

DAO	Departmental Accounting Officer
DBFO	Design, Build, Finance and Operate
DFP	Department of Finance and Personnel
NEC	New Engineering Contract
NIEA	Northern Ireland Environment Agency
NRA	National Roads Authority (Ireland)
OGC	Office of Government Commerce
PER	Project Evaluation Report
VAT	Value Added Tax

---

# Part One: Introduction and Background



## Part One: Introduction and Background

1.1 The Department for Regional Development (the Department) and a Contractor entered into a Design, Build, Finance and Operate (DBFO) contract on 16 November 2007 for the construction, operation and maintenance of 78 miles of motorway and trunk road in three Capital Works Schemes. Roads Service<sup>1</sup> managed the contract which was valued at £224.9 million and covered the following:

- Scheme 1: Beech Hill to Cloghogue (Newry) – the dualling of a seven mile stretch of the A1;
- Scheme 2: Junction Improvements at Hillsborough, Dromore, Banbridge and Loughbrickland along with a hard shoulder to Loughbrickland Bypass; and
- Scheme 3: A4 / A5 Improvements – the realignment and upgrading of the A4 between Dungannon and Ballygawley to a dual carriageway along with a number of grade separated junctions and

safety barriers. Allied to this, the realignment of the A4 at Annaghilla and provision of climbing lanes on the A5 on either side of Tullyvar Hill.

1.2 During road building schemes in rural areas of Britain and Ireland, it is not uncommon for archaeological features to be uncovered. Under the terms of the DBFO Contract, the Client - Roads Service – was liable for all costs in dealing with ‘unforeseeable archaeological features’, whilst the Contractor was liable for all costs related to all other archaeological features. In conventional contracts the Client retains all risk for the discovery of archaeology.

1.3 An examination of the relevant terms and conditions of the contract reveals the following definitions:

Unforeseeable archaeological features

*“any Fossils or Antiquities the presence of which could not reasonably have been foreseen at the date of this Agreement (16 November 2007) by a competent*



Scheme 1 at Cloghogue



Scheme 3 at Cabragh

<sup>1</sup> Roads Service was an Executive Agency of the Department until 31 March 2013.

*archaeologist acting in accordance with Good Industry Practice...”.*

Fossils and Antiquities

*“all fossils, articles of value or antiquity and structures or other remains or things of particular geological, historical or archaeological interest discovered on the Site or Adjacent Areas in the course of carrying out the Operations”.*

1.4 Following the discovery of archaeological features throughout the Schemes after construction had commenced, the Contractor argued that all of these were unforeseeable and submitted a claim for £33.7 million to Roads Service. A major element of this claim resulted from costs to mitigate delay on the three Schemes. The contract stipulated that if disputes arose between the parties, they could be formally resolved through Expert Determination, where an independent expert decides on the outcome, or, alternatively, through mediation, if both parties agreed.

1.5 In May 2011, as an alternative to Expert Determination, the Contractor suggested mediation. This involves an independent mediator facilitating a meeting to broker a potential settlement. It is a consensual and non-binding process (unless a signed agreement is achieved). Roads Service agreed to this and accepted one of the mediators suggested by the Contractor.

1.6 Mediation took place on 25 July 2011. Initially, Roads Service provided an

‘opening figure’ of £8.6 million to the Mediator. The Mediator proceeded to outline the case which Roads Service had to meet:

- there was a very significant risk of at least 75 per cent of the value of the claim for £33.7 million being the responsibility of the Department if the matter proceeded to Expert Determination or court proceedings;
- the Contractor had received a strong positive opinion on its case from a leading London barrister;
- the Contractor was prepared to go to Court – a process which may take a couple of years to resolve;
- judges in Northern Ireland have little specialist knowledge in this area; and
- the Contractor had received expert opinions from three competent archaeologists that the archaeological finds were unforeseeable.

1.7 In light of this, Roads Service made a non-negotiable offer of £16.25 million. The Contractor requested three weeks to consider this offer, but Roads Service rejected this. Following further mediation, Roads Service made a full and final offer of £17.22 million, which was accepted by the Contractor.

# Part One: Introduction and Background

## Scope of Study

- 1.8 The aim of this study was to examine:
- how effectively Roads Service sought to minimise the occurrence and consequences of a dispute over 'unforeseeable archaeology'; and
  - how effectively it managed the dispute resolution process.

## Main Conclusions

- 1.9 The main conclusions from the study are:
- Under the contract arrangements, it is unlikely that Roads Service would have been able to eliminate the risk of 'unforeseeable archaeology' even had it spent significantly more money on undertaking more extensive preliminary ground investigations. Given the inherent unforeseeable nature of the risk, it is also unlikely that risk could ever be easily or adequately evaluated and priced. As a result, our general conclusion is that Roads Service acted reasonably in retaining the risk of 'unforeseeable archaeology'.
  - Lessons learned from Roads Service and Northern Ireland Environment Agency (NIEA)<sup>2</sup> from the contract under review, have been incorporated into more recent road schemes (A5 and A8). Here, advanced archaeological contracts have been used to

deal with archaeology by 'trial trenching' which is deemed by the NIEA as clearing the site resulting in no impact on the construction programme unless unknown significant archaeology is found.

## Value for money conclusion and main recommendations

- 1.10 Frequently, when a contractual dispute goes to mediation, it is not possible to reach a definitive conclusion on value for money. As a result of the Contractor's claim for £33.7 million for archaeological finds, the Department had to pay settlement costs of £17.22 million. It had previously spent £2.6 million on advanced archaeological works to minimise the risk of such 'unforeseeable archaeology' being found. However, under the contract used, it is not possible to assess how much more it would have had to spend on advanced archaeological works to remove all archaeological risks and whether this would have been value for money.
- 1.11 Successful allocation of risk requires a clear understanding by the contracting authority (the Department) of the risks presented by a project, the broad impact that these risks may have on costs, and the limits to which a particular risk allocation might still be considered value for money. Given the costs incurred by the Department as a result of the dispute raised over unforeseeable archaeology in this case, the current

---

2 The Agency responsible for issuing archaeological excavation licences and carrying out archaeological fieldwork, surveys and excavations.

move by the Department towards NIEA approved 'trial trenching' in advanced archaeology contracts (which effectively mitigates the risk of a similar set of circumstances arising during future work) should provide greater protection to public resources.

1.12 **We recommend that the risks associated with infrastructure projects which are located in archaeologically sensitive areas should be mitigated by way of advance contracts and agreements with the Northern Ireland Environment Agency on a scheme by scheme basis.**

1.13 Disputes such as that highlighted in this case can have a significant impact on public resources. While tightening the terms of the contract can help to minimise the likelihood of disputes arising, it is vital that where they do arise, they are managed as effectively as possible to avoid damaging precedents within the wider public sector and an escalation of costs. This dispute was resolved in accordance with the contract, through mediation by an independent and neutral third party agreed between the two parties.

1.14 Best practice in the active management of disputes also requires a contracting authority to develop a mediation strategy document at the onset of a dispute in order to provide a sound basis for considering different perspectives and options and the risks each presents. Such a document can also form an audit trail of the dispute management process.

1.15 While we acknowledge that the Department did have a clear strategic view of the issues around the dispute and how it would approach the mediation process, it accepts that it had not prepared a formal written mediation strategy in advance of the mediation process.

1.16 **We recommend that before entering a mediation process, a detailed written mediation strategy should be developed to provide guidance on decision making to the negotiating team.**



Part Two:  
Minimising the risk of the dispute



## Part Two: Minimising the risk of the dispute

### Roads Service pre-contractual responsibilities

- 2.1 Whenever the issue of archaeological features associated with a planned development needs to be addressed, best practice for the Client - Roads Service – before the start of the contract, is to allow sufficient time to fully assess the presence of archaeological features and to investigate and record these to an appropriate standard. The objective is to remove or minimise the risk of delay, cost and adverse environmental impact that would be caused by encountering archaeological remains during roads construction.
- 2.2 In accordance with this approach and contractual conditions, prior to the start of road construction by the Contractor and following discussions with NIEA, Roads Service commissioned the following:
- an environmental statement which was prepared to obtain a preliminary prediction of the presence and nature of likely archaeological features; and
  - an advanced archaeological works contract (at a cost of £2.6 million) carried out in two phases:
    - Phase 1: test trench excavations – archaeological field evaluation consisting of trenches and other investigations with the objective of testing the predictions of the environmental statement and uncovering any further remains which may be present;
    - Phase 2: resolving of sites – mitigation excavation and recording at all sites where archaeological features were identified. The purpose was to uncover, investigate the features, remove them and thereby reduce the risk of encountering and the need to mitigate the impact of archaeology during the main works.
- 2.3 The excavations carried out during the advanced archaeological works contract were on targeted areas only with a view to mitigating archaeology within those areas (Scheme 1; 10 per cent, Scheme 3; 22 per cent). The advanced contract was not designed to mitigate archaeology throughout the remainder of the site, hence the inclusion of procedures within the contract documents to satisfy NIEA requirements for a watching brief.
- 2.4 As a result, both the environmental statement and the advanced archaeological works highlighted the potential of further archaeology along the proposed routes of the three Schemes. Site risk issues such as ‘unforeseeable archaeology’ are a normal feature of most road construction projects and, therefore, they must be fully considered in order that appropriate and cost effective risk allocation may be
-

achieved. Unforeseeability relates to something that is unexpected and significant, which is technically beyond the control of either Roads Service or the Contractor. Therefore, in undertaking projects of this nature it is important to understand that, from the outset, there is a risk to public finances that the outturn cost of the work will be greater than the tender price agreed for the project.

### Contractor responsibilities

2.5 The Contractor was responsible for the preparation of archaeological designs and dealing with all archaeological remains, in accordance with the requirements of the contract. This involved preparing for the possibility of discovering archaeology and if such remains were found, removing, recording and reporting on all items uncovered on the site and adjacent areas in line with recognised standards and the requirements of NIEA. These requirements include the formal licensing of archaeological investigations issued by NIEA. Where it is either agreed by the parties to the contract or determined that the archaeology uncovered constitutes 'unforeseeable archaeological features', Roads Service was to bear responsibility for the costs (including from any consequential delays etc). Otherwise, all archaeology related costs remained with the Contractor.

2.6 The alternative would have been to transfer the risk of 'unforeseeable archaeology' to the Contractor. While this provides for greater price certainty, it

has to be weighed up against ensuring value for money. Clearly, transferring the risk of 'unforeseeable archaeology' to the Contractor would have resulted in the Contractor including an amount in its tender to cover the full risk of uncovering such 'unforeseeable archaeology'. If that risk had not materialised, Roads Service would have paid for the non-occurring risk as the Contractor would have kept the tender allowance. While this would narrow the gap between tender price and final actual cost, it is unlikely to be value for money.

### Contractor raises dispute over 'unforeseeable archaeological features'

2.7 When the Contractor commenced work in November 2007, substantial amounts of archaeology were discovered in all three Schemes. Although the finds were deemed by archaeologists to be of low grade and low intrinsic value (mainly the contents of pits, ring ditches and Bronze Age Fulachta Fiadhs (cooking sites)), substantial work was required by the Contractor's appointed archaeologists to record and mitigate these archaeological features. Archaeology that has been retained has now been stored by the Contractor on behalf of Roads Service.

## Part Two: Minimising the risk of the dispute



*Ring ditches site*



*Ring ditch excavated*

2.8 Roads Service recognised the potential for very significant delay to the construction programme if the contract was not varied to allow the mitigation of 'unforeseeable archaeological features'. Negotiations were carried out between both parties and a methodology was agreed in principle and applied from April 2008. This was formally agreed for each Scheme through Letters of Amendment signed by both parties to the contract on 9 September 2008 (Scheme 1) and 10 December 2008 (Schemes 2 and 3).

2.9 Prior to amendment, the contract required the decision on unforeseeability to be made before the removal of the archaeological features. This mechanism works well where there are only a limited number of archaeological finds on a site. On this project, during the course of topsoil stripping, an unprecedented level of archaeological remains were discovered which effectively prevented work throughout the site. Roads Service amended the contract to cut the link

between determination of 'unforeseeable archaeological features' and removal, thus allowing all archaeology to be removed and avoiding unnecessary delay to the construction programme. In Roads Service's view, this reduced the potential value of any claim for archaeological delays.

2.10 As a result of the significant archaeological finds uncovered from November 2007 onwards, in May 2009 the Contractor submitted a draft claim for costs and delay relating to what it deemed to be 'unforeseeable archaeological features' amounting to £31.4 million. Roads Service responded to this claim (6 July 2009) stating that the Contractor did not properly address matters against contract responsibilities, the main one being that it did not contain the view of a competent archaeologist. Roads Service then met the Contractor (8 July 2009) when it was agreed that the Contractor would review the draft claim.

2.11 Roads Service realised that there was a risk of a claim based on individual features being considered as unforeseeable from a competent archaeologist's view and asked its expert technical advisers to provide an assessment of this. Roads Service technical advisers calculated a provision for settlement of the Contractor's claim of £5.76 million. This was based on information contained in the environmental statement and the advanced archaeological works and the following estimates of the levels of unforeseeability:

Scheme 1 – on 30 per cent of sites

Scheme 2 – on 10 per cent of sites

Scheme 3 – on 10 per cent of sites.

2.12 Roads Service technical advisers acknowledged that because of the limited information available, the estimates used could vary by +/- 50 per cent. Applying this factor the range of possible financial risk exposure ranged from £2.9 million to £8.6 million. Roads Service utilised the upper end of this risk exposure and disclosed a provision of £8.6 million in the 2009-2010 accounts which also reported a contingent liability of £22.8 million, which represented the balance of the claim.

2.13 In September 2010, the Contractor submitted a detailed claim (dated May 2010) for £33.7 million. The main elements of the claim are noted at **Figure 1**.

**Figure 1: Contractor's detailed claim**

Claim Element	£m
Archaeological Consultants <sup>(1)</sup>	3.8
Impact on Scheme 1 <sup>(2)</sup>	10.5
Impact on Scheme 2 <sup>(2)</sup>	0.6
Impact on Scheme 3 <sup>(2)</sup>	11.6
Generic Heads of Claim <sup>(3)</sup>	2.8
	<b>29.3</b>
Overheads and Profit (7.5% and 6%) <sup>(4)</sup>	4.0
	<b>33.3</b>
Insurance (1.25%) <sup>(4)</sup>	0.4
<b>Total</b>	<b>33.7</b>

Notes:

- 1 Archaeological Consultants costs are the direct costs of these professionals.
- 2 The costs for Impacts on the three Schemes refer to additional costs incurred as a result of the archaeological digs e.g. changes in earthworks and rock works, additional traffic management, additional security costs and the impact of delays on all costs.
- 3 The Generic Heads of Claim costs refer to indirect costs as a result of the archaeological digs e.g. additional site overheads and additional financing costs.
- 4 The claim also includes costs for overheads, profit and insurance, based on percentages of the claim.

2.14 The claim also contained expert opinions from two competent archaeologists. In February 2011, following advice from its expert advisers, Roads Service disputed the detailed claim. An extract of the letter to the Contractor stated:

## Part Two: Minimising the risk of the dispute

*“The submission.... (is) based on an assumption that all Fossils and Antiquities encountered during the Works which are Archaeological Remains constitute ‘Unforeseeable Archaeological Features’. In the Department’s view such an assumption is not correct. There is nothing in the submission, aside from reliance on this general assumption, explaining why any of the Fossils or Antiquities encountered constitute ‘Unforeseeable Archaeological Features’”.*

2.15 In March 2011, the Contractor submitted a further justification for its claim for unforeseen archaeology, which was supported by a further expert opinion from another competent archaeologist. This document also posed an alternative argument, claiming that Roads Service effectively varied the contract by treating archaeological finds as if they were ‘unforeseen archaeological features’ by requiring the production of archaeological designs which caused delay to the Contractor. This claim was disputed by Roads Service in May 2011.

2.16 In essence, the dispute came down to the professional judgement of a competent archaeologist around the contractual definition of ‘unforeseeable archaeological features’. The definition was:

*“any Fossils or Antiquities the presence of which could not reasonably have been foreseen at the date of this Agreement (16 November 2007) by a competent*

*archaeologist acting in accordance with Good Industry Practice....”.*

Roads Service’s view was that the Contractor had to define which items were fossils or antiquities and justify how these constituted ‘unforeseeable archaeological features’. The Contractor’s view was that, because Roads Service had carried out extensive archaeological survey work prior to the contract and had discovered archaeology, a reasonable professional interpretation was that this constituted all ‘foreseeable’ archaeology present. Therefore, the Contractor took the view that any archaeology which the Contractor subsequently discovered could be classified as unforeseeable.

### Conclusion

2.17 In our view, under the contract arrangements, it is unlikely that Roads Service would have been able to eliminate the risk of ‘unforeseeable archaeology’ even had it spent significantly more money on undertaking more extensive preliminary ground investigations. Moreover, given the inherent unforeseeable nature of the risk, it is also unlikely that risk could ever be easily or adequately evaluated and priced. As a result, our general conclusion is that Roads Service acted reasonably in retaining the risk of ‘unforeseeable archaeology’.

2.18 While we acknowledge that, under the terms of the contract, the risk of

'unforeseeable archaeology' was properly allocated to Roads Service, it is important, if such a contract is to be used in future, that the definition of unforeseeable in the contract is framed as tightly as possible in order to ensure public funds are effectively protected.

### Recommendation 1

We recommend that Roads Service should draw on its experience of this dispute to ensure that future DBFO contracts define 'unforeseeable' as tightly as possible to avoid any ambiguity which may lead to unreasonable costs.

- 2.19 Under the terms of a contract of this type, the risk of 'unforeseeable archaeology' carries within it the potential that, when events that were considered unlikely actually occur, the cost implications are likely to be valued differently by each party. As shown by this case, such differences in opinion between Roads Service and contractors can then be elevated into a formal dispute which can be time consuming and expensive, adding substantially to the cost of a contract and impacting on the achievement of value for money. As this contract demonstrates, such disputes do occur and it is vitally important that they are brought to a conclusion as efficiently and cost effectively as possible. How Roads Service managed the contractual difference with the Contractor is examined in more detail in **Part Three**.

### Current developments

- 2.20 In view of the significant cost implications of the dispute over archaeology, it is important to acknowledge the current actions being considered by Roads Service to improve the value for money of risk allocation in infrastructure projects in the longer term.
- 2.21 Since completion of this contract, the Department has taken forward a number of major road schemes on the A2, A5 and A8. Desk top studies were undertaken to target areas of potential archaeological interest and a scope was agreed with NIEA. The targeted areas covered approximately 12 per cent of each site. This is in keeping with the practice in the Republic of Ireland, where the National Roads Authority (NRA) has sought to minimise claims for archaeology by sampling around this level prior to road construction. This has been shown statistically to reduce overall costs and decrease the likelihood of archaeology being discovered and costs claimed by the contractor.
- 2.22 The main change introduced as part of the A5 and A8 schemes is that the advanced archaeological contracts awarded on these projects have been used to mitigate archaeology by 'trial trenching' which has then been deemed by NIEA as adequate to clear the site so as to minimise as far as practicable the impact on the construction programme. Any discovered archaeology has been cleared with NIEA agreement to allow works to progress. NIEA agreed that

## Part Two: Minimising the risk of the dispute

no watching brief is required during any construction works. It will be the Department's responsibility to supervise the works and highlight any areas of significance (that would have a potential for delay to the programme). If this approach had been taken on the contract under review, the majority of finds made by the Contractor during topsoil strip may have been discounted and, therefore, would have minimised delay to the contract.

### **Recommendation 2**

Given the financial implications which stemmed from the arrangements for allocating risks in the contract under review, we acknowledge that current changes to infrastructure contracts appear to provide a mechanism which can offer improved protection for the public purse. Where practical, therefore, it will be important that the risks associated with infrastructure projects which are to be located in archaeologically sensitive areas should be resolved by way of advance contracts and agreements with NIEA on a scheme by scheme basis similar to those in place for the A5 and A8 schemes.

Part Three:  
Managing the dispute resolution process



## Part Three: Managing the dispute resolution process

### The choice of resolution process

- 3.1 Disputes should be resolved in accordance with the contract and in a prompt and cost-effective manner, without compromising probity.
- 3.2 The contract stipulated that if disputes arose between the parties, they could be formally resolved through Expert Determination, where an independent expert decides on the outcome, or alternatively, mediation, if both parties agreed. The former refers to a process where an independent third party imposes a decision on the parties to the dispute and the parties participate at arms length. By its nature, the process of Expert Determination promotes probity as it is transparent and decisions are well documented and provide a clear audit trail.
- 3.3 After Roads Service disputed the second claim, rather than opt for Expert Determination, the Contractor suggested that both parties use mediation. In view of this, we examined the arrangements within which mediation took place to ensure that probity was maintained in the eventual negotiated settlement. The Office of Government Commerce (OGC) Dispute Resolution Guidance recognises that mediation is one of the alternative dispute resolution processes that should be considered and used by government departments.
- 3.4 Roads Service consulted its technical advisers on which dispute resolution process they should employ. The advice outlined the consequences of both options. These are noted below:
- Mediation seeks to arrive at a commercial settlement, rather than one which explores the detailed, technical, contractual or legal arguments. It can be used as an appropriate early step in a dispute resolution process, as any party can walk away from the process and the decision of the mediator is not legally binding. However, entering mediation could lead to a settlement above that which is reasonable and would expose Roads Service's case, should the dispute go to Expert Determination. On balance mediation provided an opportunity to resolve the dispute, with an understanding of the risks, and avoiding the Courts.
  - Expert Determination in this case would revolve around the legality of the contract and the words within the Archaeology clauses. Failure to agree at Expert Determination could, if either party was unhappy with the expert's decision, lead to the Courts, with consequent time delays and possible large legal and independent witness costs.
- 3.5 The technical advice pointed out that, should Roads Service be required to go to Expert Determination, it would be necessary to seek independent advisers in the areas of archaeology, programming construction works, earthworks and financial costing.
-

It was also advised that Roads Service should consider seeking Senior Counsel opinion prior to any Expert Determination and that it would be useful to consider obtaining Senior Council opinion to inform the mediation process. However, Roads Service did not appoint the suggested independent advisers for Expert Determination, because ultimately a settlement was reached by mediation. Roads Service decided not to seek Senior Counsel opinion to inform mediation before deciding to proceed. Roads Service's legal advisers had advised that there was not enough information for Senior Counsel to advise on, despite a claim submission running to several thousand pages and a financial claim of over fifty pages. The claim was insufficiently detailed with no clear link between cost and particular items of archaeology.

- 3.6 A recommendation to proceed to mediation was submitted to the Roads Service Chief Executive and Directors' Meeting (13 June 2011), where it was formally approved. This decision was formally ratified at the full Board Meeting (29 June 2011).

### Selection of the Mediator

- 3.7 Roads Service told us that its legal advisers informed it that there were a number of ways to select a mediator. These were to accept a choice from the Contractor, put forward their own choices to the Contractor or failing these

options, agreeing with the Contractor the selection of a mediator from an independent mediation organisation.

- 3.8 The Contractor suggested four possible mediators to Roads Service. After consulting with its expert legal and technical advisers, Roads Service acted on advice and agreed on one of these individuals to act as the Mediator. By definition, mediation involves a neutral party to the dispute. Because of the mediator's key role in resolving disputes, the parties must feel comfortable with, and have confidence in, the mediator's style and abilities. While it can be sensible to involve a neutral alternative dispute resolution organisation to assist in setting up mediation, we acknowledge that the mediation process entered into satisfied the requirements of both parties under the contract and the requirements of probity.

### The mediation process

- 3.9 Both parties agreed that the mediation process should take place over one day – 25 July 2011. Roads Service did not agree to the Contractor's request for the Mediator to provide a written opinion if no agreement was reached. Both parties set out their respective cases in written submissions to the Mediator. The key points of each party's case are summarised in **Appendix 1**.

## Part Three: Managing the dispute resolution process

3.10 The strength of the case on both sides was based on the extent to which the actual archaeological finds were deemed unforeseeable. While Roads Service had to be receptive to the argument put by the Contractor, it also had to be rigorous in expecting validation of that argument, and vice versa. To obtain a successful outcome for Roads Service, therefore, negotiations had to be undertaken by appropriately experienced and well-informed personnel.

3.11 At the mediation day, the Mediator met with both parties separately. Roads Service considered that it had assembled an effective negotiation team which was thoroughly prepared and had an in depth understanding of the contractual and factual issues surrounding the dispute. Its team included engineering staff and external resources with technical, legal and archaeological expertise. The Contractor was represented by staff from the Contractor, along with technical, legal and archaeological advisers.

### The settlement

3.12 At the outset of the mediation process, Roads Service provided an 'opening figure' of £8.6 million to the Mediator, which was the maximum financial exposure it had calculated for inclusion as a provision in the 2009-10 annual accounts (paragraph 2.12). This exposure had been calculated as ranging from a low of £2.9 million with a mid-range of £5.76 million.

3.13 Following his review of the documents submitted by both parties, the Mediator outlined the case which Roads Service had to meet:

- there was a very significant risk of at least 75 per cent of the value of the claim for £33.7 million being the responsibility of the Department if the matter proceeded to Expert Determination or court proceedings;
- the Contractor had received a strong positive opinion on its case from a leading London barrister;
- the Contractor was prepared to go to Court – this process may take a couple of years to resolve;
- judges in Northern Ireland have little specialist knowledge in this area; and
- the Contractor had received opinions from three competent archaeologists that the archaeological finds were unforeseeable.

3.14 In the light of the Mediator's comments, Roads Service increased its offer to a non-negotiable figure of £16.25 million. The Contractor requested three weeks to consider this offer, but Roads Service, fearing prolonging the process and a possibly larger claim, rejected this. Following further mediation, Roads Service decided to make a full and final offer of £17.22 million - approximately 50 per cent of the Contractor's initial claim. This was accepted by the Contractor. After agreement, it was

revealed by the Mediator that the opening request from the Contractor was for £24 million and the second figure was £21.4 million.

- 3.15 Given the experience of Roads Service in this case, extreme caution should be exercised when resolving a contract dispute, given the potentially significant impact the outcome can have on public resources. Disputes not managed properly can lead to damaging precedents and escalation of costs.
- 3.16 Despite Roads Service outlining its case to the Mediator in writing before the mediation process, it had not prepared a written mediation strategy, providing a detailed assessment of the claim and a risk analysis of the dispute. Such an approach is vitally important to promote probity around the process, by providing guidance and rigour for decision making and allow Roads Service management to consider available options and their risks. The Department stated that whilst it accepted that a formal mediation strategy was not in place prior to mediation, the team were thoroughly aware of the detailed assessment of the claim prepared by its legal and technical advisers, allowing informed decisions to be made. However, we would have expected to see a mediation strategy which contained as a minimum:

- a description of the dispute and all contributing facts;
- a discussion of the options available to resolve the dispute and the costs associated with each;
- a consideration of the source of liability and the likelihood of it being accepted at Expert Determination – has the contractor supported the claim with sufficient verifiable cost?;
- an estimate of the range of possible amounts involved – most probable outcome and worst-case scenario; and
- a potential opening offer for settlement.

- 3.17 The absence of a detailed written assessment of the claim and a risk analysis of the dispute by Roads Service meant that, at mediation, it was reacting to the various settlement figures suggested by the Contractor rather than on the basis of a detailed assessment of the claim. As a result, it is not possible to conclude whether the eventual settlement of £17.22 million represents value for money.

### Recommendation 3

Before entering the mediation process, we recommend that a detailed written mediation strategy is developed to provide guidance on decision making to the negotiating team.

## Part Three: Managing the dispute resolution process

### Approval for settlement payment

- 3.18 In November 2007, the Department of Finance and Personnel (DFP) approved £316.1 million<sup>3</sup> as part of the original business case for the DBFO Contract. However, Roads Service did not seek approval for the mediation settlement (25 July 2011), stating that it “*considered that DFP approval was not necessary either before or after the mediation as the process falls within the terms of the DBFO Contract*”. Furthermore, no approval was sought from the Departmental Accounting Officer (DAO) for the mediation settlement.
- 3.19 On 8 August 2011, the Roads Service Director of Finance wrote to the Roads Service Chief Executive, the DAO and DFP informing them of the mediation settlement of £17.22 million plus VAT, “*due to its size and nature*”. On 9 August 2011, DFP responded with a one sentence e-mail which stated “*I have noted the settlement of £17.2m resulting from the mediation process and would agree it is an acceptable and reasonable outcome*”.
- 3.20 In May 2012, Roads Service submitted a draft DBFO Project Evaluation Report (PER) to DFP for review. The original approved cost (£316.1 million) was compared to overall spend (£351.5 million)<sup>4</sup>. The overspend - £35.4 million - was outside the 10 per cent variation threshold for capital costs. This overspend would normally need to be approved by DFP at this stage.
- 3.21 In response to the draft PER, DFP stated that the Roads Service Director of Finance had asked for approval of the additional £17.22 million settlement cost in August 2011; a statement which DFP has since accepted as being incorrect. The DFP response also stated that “*the total expenditure approved by DFP for the DBFO2 project stands at £333.3 million*”. DFP has now explained that when the material provided by Roads Service was reviewed, DFP took the decision that the additional expenditure associated with the settlement did need to be approved by DFP.
- 3.22 The final PER referred to “*a final figure for the DFP approved capital cost of £333.3 million*” (£316.1 million + £17.22 million) and to the above e-mail from DFP of 9 August 2011. By virtue of this ‘approval’, the 10 per cent variation threshold was not breached (£351.5 million compared to £333.3 million is a variation of 5.4 per cent) and no further approval was required.
- 3.23 In our view, the ‘approval’ given by DFP through the e-mail of 9 August 2011 was not of the standard required. With ‘approval’ happening after the mediation settlement was agreed, retrospective approval was required. However neither of these two words were mentioned in the ‘approval’ e-mail.
- 3.24 DFP has conceded that the ‘approval’ was not of the standard normally issued by DFP. It agrees that the ‘approval’ should have been followed up by a

3 This consisted of construction costs £224.9 million, Client costs £22.8 million and land costs £68.4 million.

4 This consisted of construction costs £224.1 million, Client costs £36.9 million, Archaeological Claims Settlement costs £17.2 million and land costs £73.3 million.

formal letter to the Department, outlining in detail the facts and clearly stating that retrospective approval had been granted.

2013, Roads Service estimated that additional costs in this project, involving 'archaeological features' was in the region of £2.5 million.

#### **Recommendation 4**

When DFP is approving expenditure for government departments; in accordance with Managing Public Money Northern Ireland, all approvals should be confirmed clearly and unambiguously in writing.

- 3.27 Therefore, this contract may cost more than planned. Roads Service needs to monitor this additional expenditure closely to ensure that if it exceeds the DFP approval figure by more than 10 per cent of the original budget, DFP approval for the overspend is sought.

### **The A32 Cherrymount Link Road construction contract**

- 3.25 The Audit Office is aware that the A32 construction project has been disrupted because of the discovery of significant archaeology – a crannog (an artificial island). We asked Roads Service whether there were similarities between this contract and the DBFO Contract regarding 'unforeseen archaeology'.
- 3.26 Roads Service informed us that this project (valued at £16 million) has been procured using the NEC (New Engineering Contract) (Bill of Quantities) form of contract and is very different from the DBFO form of contract. NEC contracts are procured on the basis that the Client – Roads Service – retains all responsibility for archaeological features - there is no terminology referring to 'unforeseeable archaeological features' within the NEC form of contract. At June





## Appendix 1: Summary of Contractor and Roads Service submissions to the Mediator (paragraph 3.9)

### Contractor

- Extensive archaeology was encountered by the Contractor during the course of the work. This caused significant impact to the proposed method of working and resulted in significant delays and additional costs being incurred to ensure the contract completion dates were achieved.
- Between 2001 and 2007 Roads Service engaged competent archaeologists to undertake extensive archaeological investigations with a view to establishing the nature and extent of any archaeological deposits present on site. This concluded with the appointment of an archaeological contractor whose brief was to carry out test trench excavations *“to establish the nature and extent of any archaeological deposits and features present (Phase 1) and to resolve any sites identified prior to the construction of the proposed road (Phase 2)”*. Each of the sites identified by the archaeological contractor were resolved on site by Roads Service by July 2007.
- Although the contract was agreed in November 2007, the Contractor started to remove topsoil during September 2007. Almost immediately, archaeological features were discovered that had not been expected and which had clearly not been foreseen by competent archaeologists employed

by Roads Service. The Contractor notified Roads Service each time it encountered an archaeological find and each time Roads Service treated these finds as unforeseen and applied the procedure in the contract which applies to ‘unforeseeable archaeological features’.

- The Disclosed Data<sup>5</sup> was properly and professionally prepared by Roads Service. Therefore, to the extent that archaeology was encountered which was not identified in the Disclosed Data, it follows that this archaeology must by definition be unforeseeable as it was not foreseen by Roads Service’s consultant archaeologists.
- The draft claim for £31.4 million in May 2009 was rejected by Roads Service on the grounds that the archaeological finds were not unforeseeable, despite the fact that they applied the procedure in the contract that deals with ‘unforeseeable archaeological features’.
- An updated detailed claim for £33.7 million (dated May 2010) was again rejected by Roads Service. The reason for rejection was that the claim was based on the assumption that all archaeological finds constituted ‘unforeseeable archaeological features’. Roads Service stated view was that the finds did not constitute ‘unforeseeable archaeological features’.

<sup>5</sup> Written materials made available to the Contractor, prior to contract signing, related to the design and construction, the operation and maintenance of the project facilities, the site, the border site and the adjacent areas.

- Further supporting documentation was submitted to Roads Service in March 2011, including a report by a competent archaeologist who concurred with the Contractor's view that all the finds constituted 'unforeseeable archaeological features'. This claim also advanced an alternative argument; that in dealing with each find under the procedure in the contract which applies to 'unforeseeable archaeological features', Roads Service must either have accepted the archaeology discovered was unforeseeable or must in any event compensate the Contractor for the loss suffered as a result of being required to deal with the finds in this way. Roads Service rejected this updated claim submission and alternative argument.
- In summary the Contractor contended that each archaeological find identified in its claim constituted an 'unforeseeable archaeological feature' and that it was entitled to £33.7 million. Alternatively, the Contractor was entitled to the above sum on the grounds that it was required by Roads Service to treat such finds as if they were 'unforeseeable archaeological features' in line with the contract.

### Roads Service

- The contractual position, subject to one exception, is that the Contractor was responsible for carrying out all archaeological works. This should have been included in the Contractor's price and programme. Failure by the Contractor to do so was at its own risk.
  - The exception to this relates to 'unforeseeable archaeological features'. The contract required Roads Service to retain responsibility for cost and time implications of archaeological works with regard to 'unforeseeable archaeological features'.
  - It was the Contractor's responsibility to set out its claim in accordance with the contract i.e. that each find falls into the definition of fossils and antiquities and that it in turn constitutes an 'unforeseeable archaeological feature'. Instead the Contractor relied on documents prepared by its sub-contractor which lacked the necessary detail. The assertion that all archaeological finds constitute 'unforeseeable archaeological features' is not sufficient for the purposes of the contract.
  - The Contractor had misinterpreted the purpose and significance of the information available at the time of contracting. It is clear from the contractual definition of 'unforeseeable archaeological features' that this information was provided for the Contractor to make an informed assessment of the likely extent of other archaeological features that would be discovered
-

## Appendix 1: Summary of Contractor and Roads Service submissions to the Mediator (paragraph 3.9)

and to make provision for the time and cost implications in its bid. It was not intended as a list of all archaeology present on the sites.

- It was clear from the information available at the time of the contract that archaeological features would be encountered during the contract. A competent archaeologist would have foreseen that archaeological features commonly found close to rivers would be found since the sites contained rivers. These types of finds could not be deemed as unforeseeable within the definition of the contract.
  - The Contractor's alternative argument was that because they were required to provide archaeological designs, Roads Service was treating these finds as unforeseeable. In Roads Service's view, this argument is incorrect, because the contract clearly states that the requirement for the preparation of archaeological design applied to all archaeology.
  - The information provided to substantiate the Contractor's claim was, in Roads Service's view "*woefully inadequate*". Roads Service claimed that only 14 per cent of the value of the claim was properly supported.
  - Finally, the Contractor's claim was based on costs incurred and time delays. This was despite the fact that the work was completed ahead of schedule.
-

# NIAO Reports 2012 and 2013

Title	Date Published
<b>2012</b>	
Continuous Improvement Arrangements in the Northern Ireland Policing Board	20 March 2012
Invest NI: A Performance Review	27 March 2012
The National Fraud Initiative: Northern Ireland	26 June 2012
NIHE Management of Reponse Maintenance Contracts	4 September 2012
Department of Finance and Personnel - Collaborative Procurement and Aggregated Demand	25 September 2012
The Police Service of Northern Ireland: Use of Agency Staff	3 October 2012
The Safety of Services Provided by Health and Social Care Trusts	23 October 2012
Financial Auditing & Reporting 2012	6 November 2012
Property Asset Management in Central Government	13 November 2012
Review of the Efficiency Delivery Programme	11 December 2012
The exercise by local government auditors of their functions in the year to 31 March 2012	19 December 2012
<b>2013</b>	
Department for Regional Development: Review of an Investigation of a Whistleblower Complaint	12 February 2013
Improving Literacy and Numeracy Achievement in Schools	19 February 2013
General Report on the Health and Social Care Sector by the Comptroller and Auditor General for Northern Ireland	5 March 2013
Northern Ireland Water's Response to a Suspected Fraud	12 March 2013
Department for Culture, Arts and Leisure: Management of Major Capital Projects	22 March 2013
Sickness Absence in the Northern Ireland Public Sector	23 April 2013
Review of Continuous Improvement Arrangements in Policing	3 September 2013
The Agri-Food and Biosciences Institute (AFBI)	12 September 2013

## NIAO Reports 2012 and 2013 continued

<b>Title</b>	<b>Date Published</b>
<b>2013</b>	
Tackling Social Housing Tenancy Fraud in Northern Ireland	24 September 2013
Account NI: Review of a Public Sector Financial Shared Service Centre	1 October 2013
DOE Planning: Review of Counter Fraud Arrangements	15 October 2013
Financial Auditing & Reporting 2013	5 November 2013
The exercise by local government auditors of their functions in the year to 31 March 2013	19 November 2013

---









Published and printed by CDS

CDS 105152

