



## THE NATIONAL ASSEMBLY'S NEW BUILDING: UPDATE REPORT

Report by the National Audit Office Wales on behalf of the Auditor General for Wales



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Report by Auditor General for Wales,  
presented to the National Assembly on  
8 November 2002

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This report has been prepared for presentation to the National Assembly under the Government of Wales Act 1998.

*John Bourn*  
Auditor General for Wales

National Assembly for Wales  
Cardiff Bay  
Cardiff  
CF99 1NA

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This report was prepared for the Auditor General for Wales by the National Audit Office Wales. The National Audit Office study team comprised Gillian Body, James Verity and Jeremy Morgan.

For further information about the National Audit Office Wales please contact:

National Audit Office Wales  
3-4 Park Place  
Cardiff  
CF10 3DP

Tel: 029 2067 8500

email: [ian.summers@nao.gsi.gov.uk](mailto:ian.summers@nao.gsi.gov.uk)  
[gillian.body@nao.gsi.gov.uk](mailto:gillian.body@nao.gsi.gov.uk)  
Web site address: <http://www.agw.wales.gov.uk/index.htm>

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## Introduction

- 1 In February 2002, an adjudicator ruled on the dispute between the National Assembly for Wales (the Assembly) and the Richard Rogers Partnership in connection with the Assembly's new building project. The adjudicator decided that the Richard Rogers Partnership was due payment of £448,000 in fees from the Assembly, and that the Assembly was not due any damages in relation to their referral for a breach of contract. Following the adjudicator's decision, the Minister for Finance, Local Government and Communities wrote to me requesting that I satisfy myself that she acted prudently and on the basis of appropriate legal advice in regard to the decision to go to adjudication. I agreed to undertake this task.
- 2 As well as responding to the Minister's request, this report updates my previous letter to the Chair of the Audit Committee in November 2001 (see Annex 1). This itself was an update on my report *Accommodation Arrangements for the National Assembly for Wales* published in November 2000. Following my November 2001 update, in response to its findings, the Richard Rogers Partnership wrote to the Audit Committee making further representations.
- 3 My previous update concluded that the Assembly's new building would be smaller than envisaged at the start of the project in June 2000, would cost significantly more than the budget originally set for it, and would be available much later than planned. This current report summarises the progress that has been made on the new Assembly building since November 2001 and sets out the Assembly's plans for the future of the project. A chronology of the project is at Annex 2.

## Background

- 4 In October 1998, the Richard Rogers Partnership was selected to design a new home for the Assembly in Cardiff Bay. However, as the project progressed, concerns arose over cost increases leading to fundamental disagreements between the Assembly and the Richard Rogers Partnership. In light of this, on 17 July 2001, the Assembly terminated the Richard Rogers Partnership's employment to design the new building because of a loss of confidence in the firm's ability to deliver the project within budget. The Assembly passed a motion in plenary endorsing the decision to suspend the project.
- 5 In August 2001, a dispute arose between the two parties over the payment of fees relating to the termination of employment. The Richard Rogers Partnership submitted invoices totalling £529,000 for work undertaken in June and July 2001 and advance fees for the three months following the termination, the latter because of a clause in the contract to that effect.
- 6 On 7 August 2001, the Assembly made a without prejudice offer of a final payment of £175,000. The discrepancy between the sum claimed and that offered was due mainly to differing interpretations of the payment mechanism in the contract. The mechanism was based on the completion by the Richard Rogers Partnership of certain milestones in the work; however, to provide the Richard Rogers Partnership with reassurance as to cashflow, it had been agreed that periodic payments would be made on a monthly basis. The contract did not specify which of these elements should take precedence in the event of termination. The Assembly's offer of £175,000 was rejected by the Richard Rogers Partnership.

- 7 However, following termination of the employment of the Richard Rogers Partnership, the Assembly's solicitors, Eversheds, were instructed to advise on the situation. Their advice was that the scale of the work completed by the Richard Rogers Partnership was less than the assessment on which the £175,000 offer had been made. The legal advice also stated that the Assembly had "very good" grounds for a claim for breach of contract. This was because, on the basis of the three-day cost review in spring 2001 (Annex 1 paragraphs 16-17), the Richard Rogers Partnership had not discharged their budgetary and advisory duties with reasonable skill, care and diligence, which under the contract they were obliged to do. Therefore the £175,000 offer was formally withdrawn.
- 8 A further issue arose over who owned the copyright to the designs and related documents of the new building. The issue surfaced following a letter from the Minister for Finance, Local Government and Communities to the Richard Rogers Partnership on 30 August 2001 informing them that an advertisement requesting expressions of interest for a design and build contractor to finalise the design and complete the construction work would soon be placed in the Official Journal of the European Communities. The Richard Rogers Partnership requested that all documents prepared by them be returned immediately because they owned the copyright and design rights. The Assembly contested that the rights to these documents was vested in the Crown and that the contract stated that all documents should be delivered up to the Assembly should the contract be terminated.
- 9 Having decided in July 2001 to terminate the Richard Rogers Partnership employment, the Assembly Government was aware of the possibility of the Richard Rogers Partnership subsequently taking legal action and therefore sought specialist advice. In August 2001, the Assembly, through their solicitors, commissioned two technical reports by construction experts to explore further the question of overpayment of fees and the closely-linked issue of potential breach of contract. The reports were prepared by Probyn Miers, architectural consultants and dispute resolution experts, and Gardiner and Theobald Fairway, also experts in dispute management in the construction industry. The reports concluded that:
  - ▶ the specification requirement of the Assembly's competition brief could have been achieved within the competition budget. However, the estimate by the Richard Rogers Partnership of the total contract cost was too low, and the building could not have been built for the figure quoted in the design subsequently submitted by the Richard Rogers Partnership in response to the brief;
  - ▶ the scheme design stage had not been completed because it was undeliverable for the cost plan of £13.1 million dated January 2001; a more realistic cost at that stage was £18.6 million (a 42 per cent discrepancy). The design work likely to be required to bring the scheme within the approved budget would be extensive;
  - ▶ the Richard Rogers Partnership failed to comply with the requirement to design a building within the Assembly budget and that the Assembly incurred costs of £6.85 million (see **Figure 1** for a breakdown) as a consequence; and
  - ▶ on the basis of work undertaken by the Richard Rogers Partnership up to the date of the termination of their employment, the reasonable fee owed to them was considerably less than the amount claimed.

**Figure 1**

**Costs incurred by Assembly**

<b>Cost type</b>	<b>Examples</b>	<b>Amount £000</b>
Abortive costs	Assembly officials Sub-contractor costs Management Contractor costs External professional consultants	3,813
Fees paid to the Richard Rogers Partnership	Design fees Public information campaign	2,112
Inflation		821
Retendering		100
	<b>Total</b>	<b>6,846</b>

## The adjudication

- 10 On 10 December 2001, the Richard Rogers Partnership's solicitor made an application to the Construction Industry Council for the appointment of an adjudicator to resolve the dispute over fees and served a notice of adjudication to the Assembly (see box below for an explanation of the adjudication process). The notice sought redress for payment of the three invoices at dispute (see paragraph 5), together with interest on any sum awarded.

### The adjudication process

Adjudication is a fast track, binding form of dispute resolution that is prescribed by law in construction contracts. Adjudication was established because the length of time taken to resolve disputes involving construction companies via the courts or arbitration was so long that many companies were going out of business as a result. The process has a "temporary finality" since it is always open to either side to pursue the matter further through the courts.

Any party may refer a dispute to an independent adjudicator appointed by a professional body. A party to a construction contract can decide not to defend a matter put to adjudication but cannot prevent an application for adjudication being made by the other party. The adjudicator must reach a decision within 28 days of appointment. It is usually required that the defending party's response to the claim must be served within seven days of service of the claimant's case being served. The adjudicator may deal with the case solely on the basis of the papers submitted or may summon the parties (including expert advisers) to explain certain aspects of the case. Under the Construction Industry Council procedure, the adjudicator has to take full account of all documentation presented by either party up to the end of the 28-day period. The winning party may not recover its legal fees from the loser. The adjudicator's fee may be split between the parties, but the adjudicator may order the loser to pay the fees in full.

- 11 The Assembly received its expert reports a few days after the Richard Rogers Partnership served the notice of adjudication. In response to the adjudication notice and the findings of the expert's reports, Assembly officials identified three options:
- A do not defend the Richard Rogers Partnership claim and pay the outstanding fees;
  - B defend only on the basis that the work actually performed by the Richard Rogers Partnership does not justify the sums that they claim for;
  - C defend the Richard Rogers Partnership adjudication claim and at the same time launch an adjudication on the basis that the building as designed could never have been constructed within the budget presented by the Richard Rogers Partnership, and thus seek to recover all or a large part of the fees paid to them, plus damages for the Assembly's consequential losses.
- 12 The joint opinion of the Assembly's legal advisers, the Office of the Counsel General, Counsel and its solicitors, was that the course of action that was most likely to protect the public purse and seek to recover wasted expenditure was to pursue options B and C together. In particular, because the Assembly was advised that the cost plan was effectively 42 per cent over budget, far greater than could reasonably have been expected, there was a good chance that the Assembly could recoup substantial sums of money. In light of this legal and expert advice, Assembly officials decided that in order to protect the public purse they were duty bound to pursue this action for the recovery of funds.
- 13 The Assembly's legal advisers jointly prepared summarised legal advice and excerpts from the expert reports and submitted it to the Minister for Finance, Local Government and Communities on 14 December 2001. The Minister accepted the advice to follow options B and C on 17 December 2001. A joint letter to the First Minister from the Permanent Secretary and the Minister for Finance, Local Government and Communities was sent on 17 December 2001, confirming that the Assembly was acting on the basis of the legal advice received. The letter explained that the action to be taken was in the interest of protecting the public purse and there was little option but to seek to recover money from the Richard Rogers Partnership. It also confirmed that Counsel General and the Principal Finance Officer were satisfied that the adjudication route offered the quickest and least costly method of resolving the issue and the greatest chance of achieving a successful outcome. It also stated that the Assembly was advised that, although nothing was certain, the proposed action had "a good chance of success in recovering a substantial sum of money from [the Richard Rogers Partnership]". The same day, the First Minister agreed by signature the course of action to be taken.
- 14 Staff of the National Audit Office Wales have reviewed the papers and the process leading up to the adjudication. On that basis I am satisfied that the Assembly took appropriate advice in the effort to defend the Assembly's position and pursue value for money. The Minister for Finance, Local Government and Communities and Assembly officials took external advice from some of the leading legal experts in the United Kingdom. The Assembly's solicitors are one of the largest law firms in the world (who advise 45 of the FTSE 100 companies). The Assembly also received expert advice from barristers from one of the UK's leading chambers, Hardwicke Building. During the decision-making process, Assembly officials were assiduous in asking questions of their legal advisers on whether this was the best course of action to take. I conclude that the Assembly therefore acted reasonably in putting its faith in the judgement of its legal advisers and following their recommended course of action.

15 The Assembly served its own notice of adjudication (paragraph 11, option C) on 21 December 2001, referring the following issues:

- ▶ repayment by the Richard Rogers Partnership of all sums the Assembly believed had been overpaid because interim payments should have only been made when certain milestone activities had been completed;
- ▶ compensation for all losses caused as a result of a breach of contract (due to the Richard Rogers Partnership's failure to comply with the contractual and/or Assembly's budgetary constraints); and
- ▶ delivery of all documents prepared by the Richard Rogers Partnership, on the grounds that copyright vested in the Crown (the Richard Rogers Partnership had contested that they owned the copyright and design rights).

The notice sought the following redress:

- ▶ damages for the sum of £6.85 million (see Figure 1), plus interest on all sums due to the Assembly and all costs of the adjudicator to be paid by the Richard Rogers Partnership;
  - ▶ repayment of £500,000 of fees overpaid to the Richard Rogers Partnership, as a separate payment in the event that the adjudicator did not award damages;
  - ▶ all documents falling within the relevant clause of the contract to be delivered up to the Assembly;
  - ▶ a declaration that the Richard Rogers Partnership misrepresented the proper cost of its design to the Assembly by not complying with the budgetary constraints and/or by not discharging its budgetary and advisory duties with reasonable skill and care; and
  - ▶ a declaration as to the proper meaning in the contract as to interim and termination payment.
- 16 The Construction Industry Council appointed as adjudicator in this case Christopher Linnett, a quantity surveyor and Chartered Arbitrator. In the light of two adjudications being presented under the same contract, the adjudicator decided that both would run concurrently and that he should take account of submissions in both adjudications when making separate decisions on each case. Both parties agreed to this arrangement.
- 17 On 30 January 2002, the Assembly Government was given legal advice on the potential for an out-of-court settlement. All the legal advisers considered that it was highly unlikely that the Richard Rogers Partnership would accept any kind of offer, but there was adequate legal justification for making an offer that would potentially lead to a "drop hands" result (meaning both parties abandoning their claims and agreeing not to take any further legal action). The Assembly's solicitors advised that even though a settlement could be pursued and may work, the strength of the Assembly's case had not changed and they were still confident of success. On the basis of this advice, the Assembly Government took the view that its obligations to the public purse were unchanged and decided not to offer a settlement.

- 18 On 6 February 2002 the adjudicator delivered his decisions on the Richard Rogers Partnership claim and the Assembly's counterclaim. In summary they were as follows (a full explanation of the claims and the adjudicator's reasons for the decisions reached on both adjudications is in Annex 3):
- ▶ The Richard Rogers Partnership was entitled to payment of invoices and interest totalling £448,000 (not the full amount of £529,000 that had been claimed);
  - ▶ the Assembly were not entitled to damages for misrepresentation and/or breach of contract, nor a declaration of misrepresentation by the Richard Rogers Partnership;
  - ▶ the Assembly was not entitled to repayment of fees paid to the Richard Rogers Partnership;
  - ▶ the Richard Rogers Partnership should deliver up all documents prepared by the consultant as part or in connection with the performance of its obligations under the contract to the Assembly; and
  - ▶ the Assembly should pay almost all the adjudicator's fees of £8,700.
- 19 In compliance with the adjudicator's decision, the Assembly paid the Richard Rogers Partnership a total of £432,000 on 11 February 2002 for the unpaid fees and £16,000 interest on 22 February 2002. The delivery of documents has been the subject of discussion between the parties.
- 20 Following the adjudicator's decision, at the Assembly's request Counsel provided a note of advice. The note stated that, even in light of the decision made by the adjudicator, the advice that led to the Assembly following the course of action recommended was appropriate at that time. It is open to the Assembly to challenge the decision of the adjudicator in the courts. At the time of preparing this report, the Assembly had not decided whether to pursue this option.

## Legal and expert fees

- 21 The total legal and expert costs on this matter incurred thus far by the Assembly since the termination of the contract with the Richard Rogers Partnership are £267,000. These can be split into two areas: those directly relating to the process of adjudication and those relating to other work carried in preparation for the adjudication and subsequent work following the adjudicator's decision<sup>1</sup>. **Figure 2** summarises where these costs have fallen.

<sup>1</sup> This includes, for example, preparation of a preliminary analysis on the budget compliance claim, assessing what needed to be done to tie-up the loose ends of the contract and let the new one and seeking return of the documents and designs held by the Richard Rogers Partnership.

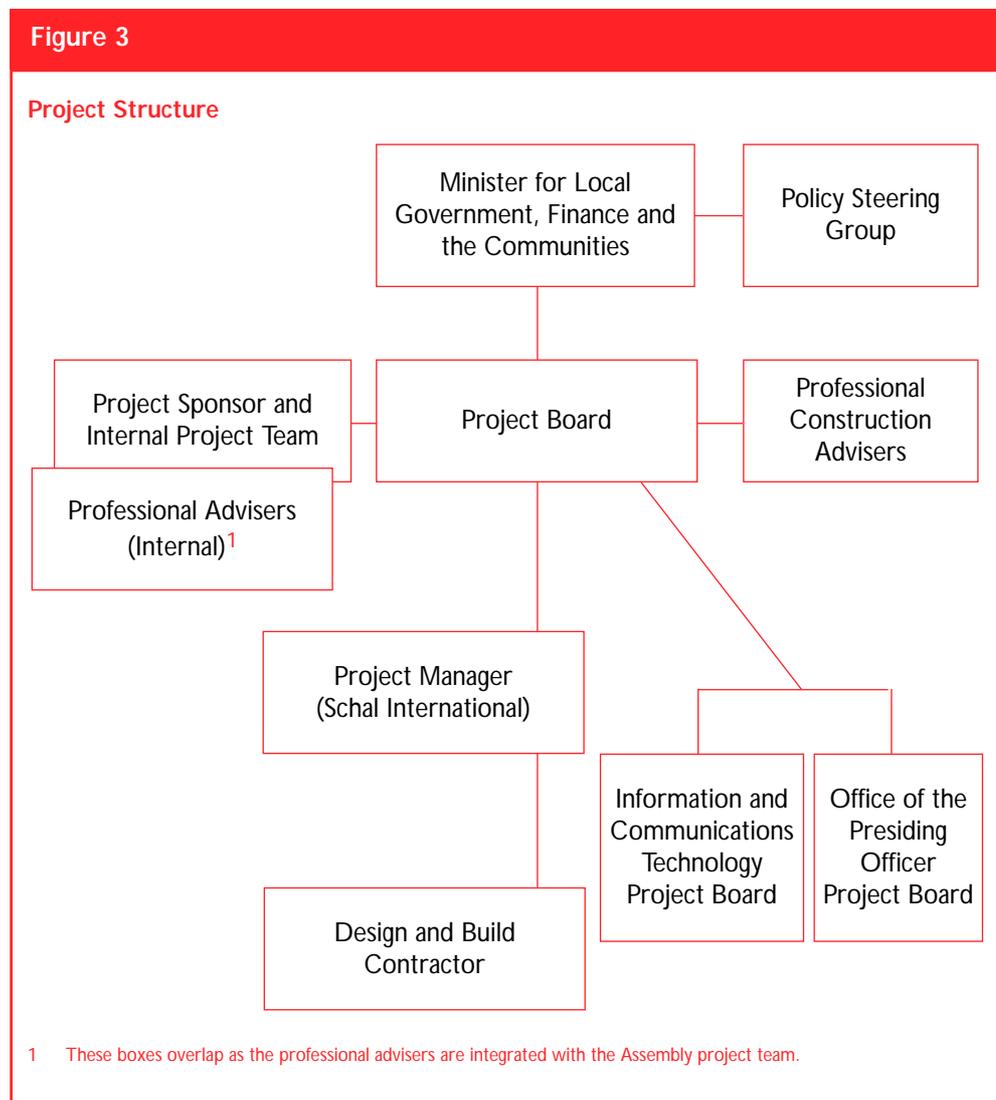
**Figure 2**

<b>Fees paid by the Assembly</b>			
<b>Fee type</b>	<b>Fees for adjudication £000</b>	<b>Other fees £000</b>	<b>Total fees £000</b>
Eversheds	96	23	119
Experts	83	0	83
Counsel	59	0	59
Disbursements	5	1	6
<b>Total</b>	<b>243</b>	<b>24</b>	<b>267</b>

## **Progress of the project**

- 22 Throughout the adjudication process, progress has continued on planning the construction of the new Assembly building. In August 2001, the Assembly commissioned Francis Graves Limited, a firm of construction project managers, chartered quantity surveyors and cost consultants, to review the whole project to the date of the termination of the Richard Rogers Partnership's employment and propose a way forward.
- 23 The report by Francis Graves Limited concluded that, in terms of the termination of employment, the "decision to stop the project by [the Assembly] was correct and brave". However, the report found a number of weaknesses in the Assembly's project management structure which, in the consultants' view, meant that "the project was highly susceptible to cost over runs". The principal weakness was that the structure and lines of accountability were complex and insufficiently clear. For example, initially there were no specific duties or terms of reference for project management. The report also highlighted that the Assembly had not had independent cost advice on the project until December 2000 when an independent quantity surveyor was appointed (a point I had noted in my first report on this subject *Accommodation Arrangements for the National Assembly for Wales*, November 2000).
- 24 The findings of this Report (which did not come to light until well into the life of the project), together with the adjudication decision, both highlight that there are lessons to be learnt by the Assembly when taking forward large projects of this type. For example, on the latter, it was clearly a fundamental weakness in the contract between the Assembly and the Richard Rogers Partnership that the crucial provision for the payment of fees was ambiguous. The Assembly was justified in attempting to tie payments to the achievement of milestones. That the relevant provision is capable of a different interpretation may prove to be an expensive shortcoming. Closer monitoring of the Richard Rogers Partnership's cost reporting might have alerted the Assembly to this issue earlier.

- 25 In light of these findings, a new structure of managing the project was recommended by the consultants and revised arrangements have been implemented by the Welsh Assembly Government. The new project structure is set out in **Figure 3** below.



- 26 The project is now given overall direction and management by a Project Board which includes the Principal Finance Officer, the Clerk to the Assembly and the Chief Estates Adviser of the Assembly. The Board also includes a professional construction adviser from outside the Assembly who provides an external perspective of scrutiny and advice. The Board reports to the Minister for Finance, Local Government and Communities who consults the Policy Steering Group. In accordance with the recommendations of the Graves report, the Welsh Assembly Government appointed in May 2002 Schal International Management Limited (part of the Carillion Group) to act as project managers. They report to the Project Board. Schal sub-contract part of their work: TPS Consult provide architectural, structural and building services and Northcroft have responsibility for cost management (quantity surveying). Through this arrangement the Welsh Assembly Government passes full responsibility to Schal for managing the delivery of the project.

## The future

- 27 The Welsh Assembly Government has also adopted an alternative procurement method for the building, in line with the recommendations of the Graves report. On 25 September 2001, an advertisement was placed in the Official Journal of the European Communities for a design and build contractor. The contract will involve the development of the existing design and completion of the construction work, including debating chamber, committee rooms, viewing galleries and infrastructure. Eight companies expressed interest in response to this notice. The Assembly is in the process of selecting two of these to be invited formally to tender for the contract. The intention is that these two companies will each receive some funding to develop and complete the existing design by the Richard Rogers Partnership. The final decision on awarding the contract will be made on the basis of this extra design work.
- 28 The new tendering process and project management structure has resulted in a revised programme of work and a new timetable. In my update of November 2001, I reported that the Assembly's latest (June 2001) estimated total cost of procuring the new building was in the range of £37 million - £47 million, a figure that the Richard Rogers Partnership fundamentally disagreed with (Annex 1, paragraphs 16-17). This was against the Assembly's original total budget in November 2000, including contingency, of £26.7 million. The current likely total forecast cost of the project will become clearer when bids for the contract to develop the design and complete the building work have been received and evaluated.
- 29 One of the elements of the building design that has undergone changes is its size. The original scheme design of November 2000 had an internal floor area of 4,866m<sup>2</sup>. In an effort to reduce costs, mainly by halving the amount of slate needed, revised plans in the first half of 2001 reduced the width of the building by three metres from the east-side elevation. However, in doing so, internal design changes were made that resulted in the building actually having a larger usable internal area of 4,983m<sup>2</sup>. This was the size of building envisaged by the Richard Rogers Partnership in their design plan of June 2001. Although the outline design, and hence size of the building, has not yet been formally agreed, the current plans are based on the original scheme design of November 2000, together with a number of elements taken from the revised design of June 2001, to give a total internal area of 5,163m<sup>2</sup>. This has been made possible by opening up internal areas rather than physically making the building bigger. The building will be "like-for-like" with the same facilities as originally planned.
- 30 **Figure 4** sets out the revised timetable for the project.

Figure 4	
Revised project timetable	
Event	Target date
Invitation to tender for works contract	October 2002
Award of works contract	July 2003
Start of works on site	October 2003
Initial completion of works contract	March 2005
Final completion of works contract	July 2005
Building operational	August 2005
Official opening	September 2005

In November 2001, I reported that the planned completion date was the second quarter of 2004, against earlier estimates of January 2003 and April 2001. The Assembly has now chosen to adopt a procurement approach which addresses buildability issues in advance of letting the contract and is designed to ensure greater control of costs; one consequence of this approach is a further extension to the project timetable of nearly a year.

## Conclusion

- 31 Following the breakdown of relations between the Assembly and the Richard Rogers Partnership and the termination of the latter's employment, there was always the likelihood that the disputes between the two parties would be pursued through litigation. The Assembly did not get the result from the adjudication process that it been looking for. However, in the light of the legal and expert advice that it had received, it was justified on value for money grounds in choosing to contest the Richard Rogers Partnership claim.
- 32 Since the events of the summer of 2001, the Assembly has effectively been in the position of restarting the project. It is wisely restructuring the management arrangements for the project, and is now in the process of selecting a company to complete the design and construct the building. However, as time passes the date when the Assembly is likely to take up occupation of the new building is further delayed.

# ANNEX 1

## Update on the Assembly's new building: report by the Auditor General for Wales to the Audit Committee - November 2001

### Letter addressed to the Chair of the Audit Committee

#### Introduction

- 1 On 17 October the Richard Rogers Partnership wrote to each individual Assembly Member setting out their understanding of events surrounding the Assembly's decision to terminate their employment. You contacted me and asked if it would be possible for me to write to you, setting out the current position with the Assembly's new building project and updating the report that I published last November. You asked for such a letter, if possible, in time for you to table at the Audit Committee meeting scheduled for November 6, thus enabling the whole Committee to be briefed on the current position. I have prepared this letter on the basis that it will be so tabled. Since we spoke, the Minister for Finance, Local Government and Communities has provided further details on this matter to Assembly Members, some of which is also covered in this letter.
- 2 You will be aware, of course, that this is an exceptionally sensitive matter. In addition to the political sensitivities, there is the possibility of legal action on the part of both the Assembly and the Richard Rogers Partnership. In this context, and given the lack of time available for staff of the National Audit Office Wales to review the papers, the material in this letter is not an in-depth audit examination of what is a very complex topic. My staff have had the opportunity to meet representatives from the Richard Rogers Partnership as well as from the Assembly. However, with the exception of paragraph 12 below, I have not sought to comment in any way on any of the issues disputed by the Assembly and the Richard Rogers Partnership as there is a prospect of legal action.
- 3 As well as providing a brief history of the project, this letter summarises the current position, provides a stocktake of the actions that have been taken on the points raised in my earlier report and records the action being taken to carry the project forward. It also sets out how the forecast cost has risen since I last reported. And it considers the matter of the fees payable to the Richard Rogers Partnership, as this was an important feature of the Committee's consideration of my report.

#### Brief resume of the history of the project

- 4 The key events in the history of this project are as follows.
  - ▶ The Richard Rogers Partnership design is selected in October 1998 (AGW report paragraph 5.7).
  - ▶ The First Secretary decides to suspend work in order to review the project and seek some reassurance on the costs (AGW report paragraphs 5.28 - 33).
  - ▶ The Assembly agrees in June 2000 to proceed with the project presented to them.
  - ▶ The Richard Rogers Partnership's Outline Design proposal is approved in July 2000, a year behind schedule (AGW report paragraph 5.12 and Figure 21).

- ▶ AGW report published and Audit Committee consideration of this report in November 2000. Audit Committee report published in May 2001.
- ▶ Richard Rogers Partnership submit Scheme Design proposals to the Assembly in November 2000.
- ▶ Concern at cost increases lead to series of reviews between December 2000 and June 2001 (considered in more detail below).
- ▶ Richard Rogers Partnership's employment by the Assembly is terminated in July 2001, the reason cited being a loss of confidence.
- ▶ Following this decision, the Assembly initiate procurement through the Official Journal of the European Community (OJEC) by inviting expressions of interest for developing the existing design, and procuring and constructing the new building. The closing date was 31 October 2001.

### **Cost increases**

- 5 Paragraphs 5.16 to 5.21 of my earlier report track the rise in total costs of the project from the £12 million originally set aside by the Welsh Office to the budgeted £23.2 million, plus an additional contingency of £3.5 million giving a total of £26.7 million, at November 2000. This contingency is outside the scope of any other contracts, and cannot be drawn on without the express permission of the Minister for Finance, Local Government and Communities (AGW report paragraphs 5.18 - 19).

### ***The Cost Plan budget***

- 6 In January 2001, the Assembly set £13.1 million as the construction cost budget for the new building. This was based on the "Cost Plan" prepared by the Richard Rogers Partnership submitted in the preceding November. The remainder of the budget, (excluding contingency), of £10.1 million, is accounted for largely by VAT, inflation, Richard Rogers Partnership's fees (see separate section below), furniture, information technology and fittings to be paid for directly by the Assembly.
- 7 On submission of their Cost Plan in November and in letters and discussions in December, the Richard Rogers Partnership warned Assembly officials that there were substantial risks outside their control that would increase the construction costs if they materialised. These risks were: higher than forecast management contractor costs; the use of indigenous materials (timber and slate); and the level of contingency within the Cost Plan (separate from the Assembly's own £3.5 million contingency, referred to above). The Richard Rogers Partnership's assessment of these risks is set out at Appendix 1.
- 8 The Assembly and the Richard Rogers Partnership fundamentally disagree as to the status and scope of the Cost Plan and associated cost forecast.
- 9 I recommended in my report of November 2000 that the Assembly consider either contracting directly with the quantity surveyor (who had been appointed by the Richard Rogers Partnership) or engage its own quantity surveyor to review the work of the design team. The Assembly acted on this recommendation in December 2000 and appointed its own quantity surveyor (Symonds, the same firm that provided the project manager).

- 10 By the time that the Minister for Finance, Local Government and Communities (the Finance Minister) reported on progress to the Assembly in January 2001, one of the risk factors of which the Richard Rogers Partnership had warned, management contractor costs, had materialised. The Assembly put the known additional costs of this at £470,000 (including VAT). In addition, the Assembly's own quantity surveyor (see previous paragraph) had warned that: elements not included in the tender price could result in due course in increased costs of £375,000 (including VAT); and other shortfalls in the Cost Plan might, on a worse case scenario, require a further £1.17 million (including VAT). The Richard Rogers Partnership, however, dispute these figures.
- 11 In her statement in January 2001, the Finance Minister reported that they remained "on course to deliver a ... building on time and within total budget provision". She said that "some cost pressures have arisen; the £470,000 attributable to the management contract commission would be absorbed into the Cost Plan without recourse to the formal contingency provision of £3.5 million". She went on to say that "it is likely that we will need to draw down some of the contingency" and also that she had asked for a review of costs to be undertaken. She concluded by saying that the Assembly remained "on course for occupation ... in January 2003, as planned".
- 12 In my view, the Finance Minister's statement was consistent with the information on costs then available to her. She was aware that other risks (on top of the £470,000 already dealt with) had been identified which, if they materialised, would put significant further pressures on the budget. However, to the extent that they were known about at the time, they were capable of accommodation within the £3.5 million contingency she held on behalf of the Assembly. If the Richard Rogers Partnership view of the possible additional costs were correct, this, too, could have been contained within the contingency.

#### *Cost reviews*

- 13 In view of the warnings being given by the Richard Rogers Partnership and the Assembly's own quantity surveyor about the possible rise in costs, the Assembly asked its quantity surveyor to carry out a review. The results of this review were reported in February 2001: the conclusion was that, based on the information available to him, the most likely outturn construction cost was £16.5 million, compared to the equivalent Cost Plan figure of £13.8 million (including inflation). Reasons for this increase included, but were not limited to, the three risk factors warned of by the Richard Rogers Partnership.
- 14 In April 2001 a fundamental review of the Cost Plan by the Richard Rogers Partnership's quantity surveyor (Hanscomb) produced a revised figure of £17.4 million for the construction cost. Assembly officials asked the Richard Rogers Partnership to carry out a cost reduction exercise aimed at reducing the costs by at least £2 million, stating that a Cost Plan of £15.5 million was the absolute maximum figure that would keep the Assembly within budget provision.
- 15 In response, the Richard Rogers Partnership proposed a smaller building which, with other design amendments, they considered could be built at this cost (£15.5 million). However, the Assembly, on the advice of its professional advisers from the Symonds Group (quantity surveyor and project manager), put the cost of this revised design at £17.5 million, with a further £2.2 million at risk. There was a clear difference of opinion between the two quantity surveyors as to the estimates being predicted.

- 16 In late May the Finance Minister met Lord Rogers and both agreed that all parties would work urgently to produce a robust, realistic outturn cost figure. This led to a three day meeting involving all the key parties, chaired by the Assembly's quantity surveyor and including representatives from the Richard Rogers Partnership and their quantity surveyor. An estimated outturn cost figure of **£24.1 million** was produced. The Assembly's advisers indicated that in addition to this figure there was a potential risk totalling £9 million. On this basis, the Assembly puts the total cost of procuring its new building in the range £37 million - £47 million (depending on whether savings could be achieved and whether risks materialised), against its total budget, including contingency, of £26.7 million.
- 17 However, the Richard Rogers Partnership fundamentally disagree that the figure of £24.1 million was a realistic estimate of outturn construction cost; in their view it was a "worst case scenario inclusive of [all] risks, whether actual or speculative, that the assembled group imagined would befall the project" (Richard Rogers Partnership statement to Assembly Members, October 2001). They were not aware of the work that had led to the identification of risks valued at up to £9 million, nor do they know how the figure was derived.
- 18 The table below summarises how the construction costs and total costs rose over the period November 2000 to June 2001; Appendix 1 analyses the three key stages (November, April and June) in more detail, and gives the views of both the Assembly's quantity surveyor and the Richard Rogers Partnership on the causes behind the cost rises.

Date	Out-turn construction cost £m (including inflation but excluding VAT)	Total cost £m including (VAT)	Notes	Paragraph reference
November 2000	13.8	26.7	Per the Cost Plan and the Assembly budget	6-8
February 2001	16.5	?	Per Assembly quantity surveyor	13
April 2001	17.4	?	Per Richard Rogers Partnership quantity surveyor	14
<i>Cost reduction exercise, leading to revised design</i>				
April - May 2001	15.5 17.5 (min.)	?	Per Richard Rogers Partnership Per Assembly	15
June 2001	24.1	37 - 47	Per 3-day workshop [figure not accepted by Richard Rogers Partnership]	16-17

- 19 Following the Assembly's decision to terminate Richard Rogers Partnership's employment, Lord Rogers and the Finance Minister had a series of exchanges by correspondence over whether there was scope for the Richard Rogers Partnership's continued involvement in the project. The Richard Rogers Partnership suggested an independent review of costs and mediation. However, these exchanges did not lead to any change in policy. Around the same time (August - September 2001) overtures were made by a third party (Paul Hyett, President of the Royal Institute of British Architects) to act as mediator between Richard Rogers Partnership and the Assembly - again, with no effect.

#### ***Management contract***

- 20 It is important to be aware of the contractual framework. The Welsh Office had decided to adopt a management contracting approach to the procurement of the new building, which was continued by the Assembly. Under a management contract, there is overlap between the design and construction elements of the project. This approach has the advantage of speed, in terms of early completion of the project. However, it also has the drawback of cost uncertainty - as has been found in this case. Paragraphs 3.24 - 29 and Figure 11 of my earlier report set out this issue in more detail.

#### **Richard Rogers Partnership fees**

- 21 My previous report highlighted at paragraphs 5.22 - 24 that the existing fee structure for the Richard Rogers Partnership design team, which flowed from the original design competition, provided no incentive to reduce costs and had itself been the cause of earlier cost increases. I recommended that this fee structure be renegotiated in such a way as to minimise the relationship between the base fee and the construction cost.
- 22 The Assembly acted on this recommendation and has taken steps designed to decouple the fees from the construction cost. In October 2000, at the Assembly's request, the Richard Rogers Partnership agreed in principle to fix the design team fee to a lump sum. This issue was negotiated during the period October 2000 to April 2001 alongside the wider debates on total cost. In April, both parties agreed in principle that fees payable to the Richard Rogers Partnership design team would be capped at 21.1 per cent of £13.95 million (that is, £2.94 million). However, while the parties agreed that the same percentage would be payable in respect of any increase in the cost of design changes instigated by the Assembly, they were unable to agree whether any allowance should also be made for increases in costs owing to the use of indigenous materials or changes in specification instructed by the Assembly. This issue was never resolved as the debate came to focus increasingly on the matter of estimated construction cost rises.
- 23 When the Audit Committee considered the issue of Richard Rogers Partnership's fees, they also recommended that the contract between the Assembly and the Richard Rogers Partnership be signed. This has not happened because the Richard Rogers Partnership and the Assembly were unable to reach agreement on the level of fees to be paid. However, the Assembly's position, without prejudice to any arguments it may deploy in future litigation, is that there is a concluded contract between the parties on the basis of the original Agreement between the Richard Rogers Partnership and the Assembly for Richard Rogers Partnership's provision of design services, by virtue of the fact that both parties have relied on it. Though the Agreement is unsigned, undated and at least partially incomplete because of the failure to agree on a final formula for fees, an interim payment scheme has been agreed. Appropriate legal advice has been obtained which is of course subject to privilege.

## Current situation

- 24 Prior to the decision to terminate Richard Rogers Partnership's employment in July 2001, the Assembly carried out an option appraisal to determine the way forward. These option appraisals included sensitivity analyses of the risks involved (as I had recommended in my earlier report - paragraphs 2.5 - 6 and Key Points box on page 20). Eight options were evaluated, although four were included for comparative purposes only.
- 25 The Assembly considered that the option offering best value for money was to appoint a developer to complete the design and secure the construction of the building; the Assembly would either buy the building at the outset or lease it over 22 years. A notice to this effect was subsequently placed in the Official Journal of the European Community (OJEC) on 25 September 2001. The notice states that the cost of development and construction is estimated to be in excess of £20 million. The notice also specifies completion by the second quarter of 2004 - a delay of up to 18 months compared with the target of January 2003 in place at November 2000 (and the original target of April 2001).

## Process reviews

- 26 Because of the troubled history associated with the new building and the potential for legal action, the Permanent Secretary requested that the Assembly's Internal Audit Services conduct a review of the Assembly's documentation for the project. Two of the objectives of this review were to determine whether the record:
  - ▶ provided evidence that timely and sufficient breadth and depth of advice was received from professional and other staff engaged on the project; and
  - ▶ confirmed that the briefing and responses given to Assembly Members by officials were clear, accurate, timely and of sufficient breadth and depth.
- 27 The Internal Audit Services report was concluded in late October 2001 and found that the project records were well maintained; critical decisions were informed by advice from an adequate range of experts on a timely basis, and the information submitted to Assembly Members was properly and clearly presented.
- 28 In September 2001, the Assembly, through the Office of the Counsel General, commissioned an independent review of the project from the design competition to the termination of Richard Rogers Partnership's employment. This review was carried out by Francis Graves Ltd, a firm of consultants considered to have particular expertise in construction projects. In view of the possibility of litigation, the consultants were asked not to contact either the Richard Rogers Partnership or their design team as part of the review. At the time of writing this letter the emerging findings of the review were being discussed by the reviewers and the Assembly and had not been finalised. The reviewers are also producing a separate report on the structure and approach which the Assembly should take to the project in its next stages.

## **Conclusion**

- 29 The story of this project highlights the challenges faced by those procuring major buildings of this type and also by those contracted to deliver the project. Although the final outcome is as yet unknown, it seems likely that the Assembly's new building will be smaller than envisaged when the Assembly voted to proceed with the project in June 2000, will cost significantly more than the budget originally set for it, and will be available much later than had been planned. However, this is a complex and technical area on which there are clearly differing opinions between the professional consultants, and the reasons giving rise to these problems may be the subject of litigation. I propose to report further at an appropriate time to provide a full analysis of how the project has progressed and of the outcome.

**Sir John Bourn**  
**Auditor General for Wales**  
**November 2001**

## Appendix 1- Reasons for the increase in building costs

### According to the Richard Rogers Partnership

In their communication to Assembly members on October 17, Richard Rogers Partnership included a table showing why costs had risen, recreated below. It showed the increase from the Cost Plan budget of £13.1 million to the £24.1 million arising from the three-day review (although this latter figure is not accepted), an increase of £11 million.

Reason	Cost £m	Richard Rogers Partnership's comments
Inflation from November 2000 to completion	0.7	
Additional contractor prelims	1.5	Of which Richard Rogers Partnership warned of £1.3 million in their November, December and February letters, which was the appropriate figure at that time.
Additional contingency	1.5	Of which Richard Rogers Partnership warned of £1.3 million in their November, December and February letters.
Additional contingency assessment by Symonds	1.1	
Client-requested changes to the Scheme Design specification, and additions to scope of work requested by the Assembly	2.6	Eg a stainless steel roof, Welsh slate (as previously warned), enhanced chamber and committee room seating, additional works to Pierhead Street, signage and additional security
Procurement risk	1.3	An additional allowance for possible high tender returns, including an allowance of £300,000 for the concrete package that did not materialise
Richard Rogers Partnership anticipated design development	1.2	Richard Rogers Partnership were in the process of identifying cost savings to offset this figure
Extension of time - additional contractor charges resulting from anticipated 6 month delay to completion date	1.1	
<b>Total</b>	<b>11.0</b>	

### According to the Assembly

Following the three-day workshop in May-June 2001, the Assembly's quantity surveyor (Symonds) produced a report which showed in detail how the costs had risen from the original Cost Plan budget of £13.8 million (including inflation), to the £17.4 million produced by Hanscomb in April 2001, and hence to the £24.1 million arising out of the workshop (the methodology adopted at the workshop was to adjust the Hanscomb budget on a line by line basis).

Element	Cost increase/(decrease)	
	November to April £	April to June £
1 Enabling/ Groundworks	-	9,523
2 Piling	243,154	77,500
3 RC Works	184,343	478,485
4 Structural Steelworks	91,910	281,615
5 Roof Carcassing and Finish	150,270	975,280
6 Glazing	339,950	145,050
7 Building Services	(166,200)	675,500
7A Exploratory Drilling	20,000	5,000
7B Heat Exchangers	280,000	(60,000)
8 Timber Cladding	1,032,399	(50,340)
9 Slate Cladding	116,970	10,860
9A Slate Supply	-	543,880
10 Lifts	8,400	(70,000)
12 Builders Work	61,125	190,000
13 Stud Partitions	75,307	-
14 Tiling	(37,850)	-
15 Precast concrete	2,000	-
16 Raised floors	5,000	-
17 Architectural Metalwork	375,000	(68,200)
19 Waterproof Membrane	2,000	9,840
20 Internal Joinery	(10,990)	80,000
21 Carpets	12,810	-
22 Fittings	105,000	685,000
23 Boardwalk	8,000	150,000
24 Demountable Partitions	60,320	-
26 Timber Flooring	(54,895)	-
27 Blockwork	3,020	-
28 Painting and Decorating	16,382	-
30 Hard Landscaping	20,000	604,590
31 Soft Landscaping	-	(55,000)
32 Slate Externally	2,000	(9,990)
Design Reserve	750,000	261,600
Management Contractor prelims	289,977	800,000
Fee	282,532	200,000
Budget Prelims	269,423	90,000
Construction Contingency	(1,081,515)	763,400
<b>Total</b>	<b>3,455,842<sup>1</sup></b>	<b>6,723,593<sup>2</sup></b>
1	The difference (after roundings) between the £13.8 million at November and the £17.4 million in April	
2	The difference (after roundings) between the £17.4 million in April and the £24.1 million in June	

The Assembly's quantity surveyor attributed each element of the change in price to one of a number of factors. The main factors which led to cost rises, according to this report, are set out below.

## Reasons for cost increases

	November - April £m	April - June £m	Total £m
Underestimation of cost	2.3	2.2	4.5
Underestimation of content of work/specification	1.05	1.8	2.85
Design change (cost reduction exercise)	N/A	(0.6)	(0.6)
Client change	-	1.2	1.2
Other	0.15	2.1	2.25
<i>Sub-total</i>	<i>3.5</i>	<i>6.7</i>	<i>10.2</i>
Add: inflation			0.7
<b>Total</b>			<b>10.9<sup>1</sup></b>
<p>1 Roundings account for the minor difference between this total and the £11 million shown in the analysis according to Richard Rogers Partnership.</p>			

# ANNEX 2

## Chronology of events

Date	Event
30 June 2001	Richard Rogers Partnership submit invoice for £150,750.
17 July 2001	Assembly terminates Richard Rogers Partnership employment.
August 2001	Francis Graves review commenced.
1 August 2001	Richard Rogers Partnership submit two invoices for unpaid fees of £216,950 and £82,699.
7 August 2001	Assembly makes interim fee payment offer of £175,000, subsequently rejected.
30 August 2001	Letter to Richard Rogers Partnership from Assembly informing them that OJEC advert to be placed.
25 September 2001	Assembly places advertisement in OJEC for expressions of interest for design and build contractor.
31 October 2001	Final date for expressions of interest for design and build contractor.
November 2001	AGW letter to Chair of Audit Committee, updating current position.
10 December 2001	Richard Rogers Partnership make application to Construction Industry Council for appointment of adjudicator to resolve fees issue.
14 December 2001	Assembly places advertisement in OJEC for Project Management Team.
14 December 2001	Legal advice presented to Minister for Finance, Local Government and Communities which is accepted and acted upon.
17 December 2001	First Minister views legal advice and agrees to take recommended course of action.
17 December 2001	Richard Rogers Partnership serve Statement of Case to adjudicator.
19 December 2001	Assembly challenges validity of Richard Rogers Partnership adjudication notice.
21 December 2001	Assembly serves notice of adjudication in regard to fees and breach of contract.
2 January 2002	Assembly responds to Richard Rogers Partnership Statement of Case.
11 January 2002	Assembly serves own Statement of Case.

<b>Date</b>	<b>Event</b>
22 January 2002	Richard Rogers Partnership serve response to Assembly's response to Statement of Case.
25 January 2002	Meeting held between adjudicator, Assembly and Richard Rogers Partnership.
30 January 2002	Assembly decides against making "out of court" settlement.
6 February 2002	Adjudicator's decision is published.
11 February 2002	Assembly pays the Richard Rogers Partnership fees of £432,000 as instructed by the adjudicator.
22 February 2002	Assembly pays the Richard Rogers Partnership interest on the fees of £16,000 as instructed by the adjudicator.
24 April 2002	First meeting of Project Board following adjudication.
16 May 2002	Assembly appoints Schal International as Project Managers.
2 July 2002	Procurement workshop.
12-13 August 2002	Project workshop.

# ANNEX 3

## Adjudicator's decisions

### Richard Rogers Partnership referral

Claim	Decision	Reason
Richard Rogers Partnership claimed that they were entitled to payment of an invoice for the sum of £177,131. The Assembly withheld payment because they alleged that the Richard Rogers Partnership was overpaid for the work done at the time. The Assembly stated that the detailed design was delayed when compared to various design programmes and the Control Programme.	Richard Rogers Partnership was entitled to payment of an invoice for the sum of £177,131.	The adjudicator judged that approval of outline and scheme designs had been given and that approval could not be withdrawn retrospectively.
Richard Rogers Partnership claimed that they were entitled to payment of an invoice for the sum of £254,916 as a result of the termination of their services. The relevant clause in the contract stated that the costs to which the Richard Rogers Partnership are committed at the date of the termination of the contract should be represented by the next three months' fee payments which would have come after the date of termination. The Assembly contested that the Richard Rogers Partnership was only owed the amount fairly and properly due in respect of work carried out.	Richard Rogers Partnership was entitled to payment of the invoice for the sum of £254,916	The adjudicator judged that the next three months fee payments that would have fallen were due and therefore stated that the invoice should be paid.
Interest was due on the above two unpaid invoices to the date of adjudication.	Richard Rogers Partnership was entitled to an interest payment of £16,038 from the two invoices to be paid by the Assembly.	In light of the adjudicator deciding that payment was due, interest was payable on the above two invoices.
Richard Rogers Partnership claimed that they were entitled to payment of an invoice for the sum of £97,136. The Assembly withheld payment because the payment scheme in the contract provided for payment at monthly rests and there was no provision for payment in respect for shorter periods.	Richard Rogers Partnership was not entitled to payment an invoice for the sum of £97,136.	The adjudicator agreed that payment was due only for monthly instalments and not shorter periods.
	The Assembly should pay £3,525 of the adjudicator's fees.	The Assembly was the losing party in the majority of the adjudication and had to pay the related amount of fees.
	The Richard Rogers Partnership should pay £501 of the adjudicator's fees.	The Richard Rogers Partnership lost in one area of the adjudication and had to pay the fees in relation to that issue.

## The Assembly's referral

Claim	Decision	Reason
<p>The Assembly claimed that the representation made by the Richard Rogers Partnership, that their design could have been constructed for a sum not exceeding £11.5 million was inaccurate and given negligently. As a result of this misrepresentation, the Assembly suffered losses of £6,846,707.</p>	<p>The Assembly was not entitled to a declaration that the Richard Rogers Partnership misrepresented the proper cost of its design and induced the Assembly to enter into a contract with the Richard Rogers Partnership or that they breached the terms of the contract by not complying with the budgetary constraints or not discharging their budgetary and advisory duties with reasonable skill and care. As a result of this, the Assembly is not entitled to damages for misrepresentation and/or breach of contract.</p>	<p>The adjudicator stated that he was satisfied that the Assembly's case on misrepresentation was "not proven in any respect". He said that when the Richard Rogers Partnership gave cost estimates, they were opinion, not fact. He was not satisfied that these cost estimates had been shown to be false.</p> <p>The adjudicator stated that by April 2001 the Assembly believed that the cost of the building was likely to exceed its budget and this appeared to have been agreed by both parties, although they disagreed on the extent to which the costs were likely to increase. He said that whatever the figure the Assembly appear to be justified in alleging that Richard Rogers had under-estimated the cost of the works. However, he was not satisfied that the Assembly had shown that Richard Rogers failed to carry out their duties to a standard of a professional consultant who is experienced and competent in the provision of services of the same or similar nature, size, scope and complexity. The Assembly was therefore not entitled to any damages relating to this claim.</p>
<p>The Assembly should be repaid the fees paid to the Richard Rogers Partnership because they were only entitled to interim payments in accordance with stages reached as set out in the contract between the two parties.</p>	<p>The Assembly was not entitled to repayment of fees paid to the Richard Rogers Partnership.</p>	<p>Based on the decision made in the adjudication referred by the Richard Rogers Partnership, the Assembly was not entitled to repayment of fees paid to the Richard Rogers Partnership.</p>
<p>The copyright in all the documents prepared by the Richard Rogers Partnership in relation to the project vests in the Crown.</p>	<p>The Richard Rogers Partnership should deliver up all documents prepared by the consultant as part or in connection with the performance of its obligations under the contract to the Assembly.</p>	<p>The adjudicator agreed that copyright in all documents under the relevant clause in the contract vests in the crown as stated in the contract.</p>
	<p>The Assembly should pay the total sum of £4,705 for the adjudicator's fees.</p>	<p>The Assembly lost the adjudication and therefore had to pay the fees in full.</p>