

23.06.22

By email.

FAO: Public Audit Committee, Scottish Parliament.

Dear Convener,

Invitation to provide evidence to the Public Audit Committee regarding 'New vessels for the Clyde and Hebrides: Arrangements to deliver vessels 801 and 801'

Thank you for your invitation to provide evidence to the Public Audit Committee regarding the above. I am happy to oblige and re-iterate my willingness to attend in person to further assist the work of the committee.

A great deal of information was published proactively by Scottish Government in December 2019 regarding key events in relation the issues raised. I also note the report by the Auditor General, the report by the Rural Economy and Connectivity Committee, and evidence given to your committee. I respect that you are asking about considerations at the time.

You will be aware of the provisions of the Scottish Ministerial Code, 'Radcliffe Rules' and expectations around commercial confidentiality that I shall of course abide by.

Initial arrangements to deliver the vessels

- At what stage in the procurement process did you first become aware that FMEL was unable to offer a full Builders Refund Guarantee (BRG)?

I was first aware of the guarantees issue following the selection of preferred bidder, but also aware negotiations were ongoing. I saw the detail of the issue as presented in the submission to me dated 08 October 2015.

- At any point did you indicate to FMEL that a BRG was not required to secure the contracts, and if so, on what basis?

No. This would be a matter for CMAL. However, I note the interpretation of FMEL of the written ministerial response to Stuart McMillan MSP dated 2 February 2015 as detailed at evidence to your committee. This letter was a factual response to an MSP enquiry at the time.

- Why the decision was made to announce FMEL as the preferred bidder on 31 August 2015 when contract negotiations on the BRG between CMAL and FMEL were still under way, and what impact you consider this may have had on CMAL's negotiating position?

I recall press speculation at the time on who had been selected. Bidders had been informed, a milestone reached, and no reason to withhold the factual position. Press release and coverage at the time would have stated the award would be subject to ongoing negotiations, therefore I do not believe the announcement would have undermined CMAL's negotiating position.

- Upon receiving information detailing CMAL's significant concerns of awarding the contracts to FMEL, including its inability to provide a full BRG, what discussion, if any, did you have with the following stakeholders to inform your decision to approve the awarding of the contracts to FMEL-
 - The senior executives at CMAL and CMAL Board Members (*particularly given it appears different views on the risks involved in awarding the contract were held*)
 - Transport Scotland Officials
 - Scottish Government officials
 - Other Scottish Ministers.

There was no further information requested or discussion that I recall. I was satisfied with the information that was provided at the time, and that all relevant officials had been involved in the submission.

- What assessment of the risks did you undertake to satisfy yourself that you were content to recommend approval of the contracts to FMEL, despite significant risks and concerns raised by CMAL, and why this decision was made so quickly after receiving these concerns?

The recommendation in the submission was 'to proceed to contract award'. The submission had followed the necessary process, procurement assessment and milestone stages, therefore I had confidence in the recommendation, but appreciated that risks had been identified and understood to be resolved.

Ongoing CMAL concerns in the event of failure were about the risks 'to the company' ie CMAL, and therefore that Scottish Government should give further reassurance on risk transfer to CMAL, which is covered in detail in the submission.

Risk analysis would be expected in such a submission, with mitigations also presented.

There was a high level of confidence in the yard, which had successfully completed other vessels for the Calmac fleet. There was also an expectation that there would be sufficient monitoring and oversight.

The committee will also note that CMAL would have robustly defended a legal challenge to an award.

The swift response was possible as the submission narrated the issues and the proposed way forward, which would have been satisfactory.

- To what extent you consider Transport Scotland made a clear and compelling case in its correspondence of 8 October 2015 to approve the decision to award the contract to FMEL?

As stated above I was satisfied that there was sufficient information to proceed with the recommendation, noting the purpose of this particular submission but mindful of previous submissions and briefings that would have detailed the benefits of the proposed award. As has been publicly stated, the yard won on quality with an impressive bid.

- Whether any documentary evidence exists which explains why the decision was made to proceed with the contracts

Note the considerations above. However, other than the email response to the 8 October 2015 submission, I am not aware of, nor hold any such documents.

Response when the project encountered problems

- When did you first become aware of problems and delays in building the vessels and how were you informed?

I understand the Minister for Transport was notified of concerns in December 2016, and I recall him alerting me to these concerns initially, and thereafter officials updating me as appropriate.

- In May 2017, Scottish Ministers agreed to accelerate £14.55 million of payments to FMEL after a meeting with an FMEL director. Please provide details of any other direct engagement you, or any other Scottish Ministers had with FMEL during the time it was responsible for constructing the vessels, and what the nature of these discussions were.

FMEL had raised their concerns and perspective with officials and directly with ministers on a number of occasions. I would of course give a fair hearing to those representations and consider advice accordingly.

The nature of the case being represented by FMEL features in the report by the Auditor General, the report by the Rural Economy and Connectivity Committee, and also the evidence to your committee.

The information release as published on the Scottish Government website will cover some of these interactions, by call, correspondence or meeting, however I personally do not hold further records as per the ministerial code.

- In noting the conflicting points of view raised by both CMAL and FMEL, the role you fulfilled in seeking to resolve this dispute, and the challenges you faced in doing.

In recognising the nature and implications of the dispute I made every effort to take advice, ensure fairness, provide challenge and support to officials, engage with other ministers and request review and independent intervention when necessary. I explored every action possible to find a resolution and was proactive in considering contingency plans.

There was an imperative to complete the vessels for island communities, safeguard jobs, ensure a bright future for the yard and ensure value for money. At every stage my decisions were taken with the best intentions to achieve the above, however clearly relationships between CMAL and FMEL had broken down and respective positions varied.

A further challenge would have been trying to resolve matters within the transport governance arrangements at the time, which have subsequently been reviewed.

- Why Scottish Ministers did not force CMAL and FMEL to use the dispute resolution mechanisms contained within the contracts?

The nature of the dispute, breakdown in relationships, and inability to deliver the desired outcome would have rendered such a 'forced' action redundant.

Scottish Government loans

- The Scottish Government provided FMEL with two loans in September 2017 and June 2018 worth a total of £45 million. In the interest of transparency why was it considered necessary to only inform the Scottish Parliament of the second loan?

Although not obliged to, I felt that it was in the interests of transparency to inform the Scottish Parliament of both loans.

- Why did the Scottish Government allow FMEL to drawdown the full £30 million loan, provided in June 2018, despite clear evidence of vessel delays?

The drawdown would have been in line with the stated purpose and terms of the loans. It also allowed FMEL to retain its workforce as suppliers, and without the loans clearly there would be less progress on the vessels. Again, there would be disputed analysis of progress.

Government clearly desired the completion of the vessels, but also had a wider role on supporting business. Commercial confidentiality must also be respected.

- In your role as former Cabinet Secretary for Finance and the Constitution, did you ever attempt to establish how FMEL used the loan funding provided to it?

Yes, and information was forthcoming.

Bringing the shipyard into public ownership

- Why a decision was taken by the Scottish Government to nationalise the shipyard without an apparent full understanding of the costs and challenges.

A critical point in timing had been reached. The objectives of Scottish Ministers were to complete the two public sector vessels under construction at the shipyard in Port Glasgow, safeguard the jobs of the workforce, and secure a future for the business and commercial shipbuilding on the Clyde.

There had been comprehensive and frequently updated options analysis and contingency work. It was believed the best way to deliver the objectives above was to proceed with the nationalisation route.

Such a decision would have included a range of considerations, including cost and challenges involved, with as much diligence as could be conducted with FMEL at the time.

With the yard in public ownership further analysis could be conducted and decisions taken, but the alternative of walking away would not have achieved the stated objectives of the government. The option of finding another commercial buyer was also not ruled out, but the public ownership option was the best outcome at the time and the right thing to do in the circumstances.

I trust this submission is of assistance, and I look forward to hearing from you.

Yours sincerely,

Derek Mackay