

New Vessels for the Clyde and Hebrides

Fourth Written submission from Robert Trythall, by email 29 August 2022

The PAC has not forensically examined/interrogated the PQQ stage of the tender.

All the evidence indicates:-

- **FMEL did not meet the PQQ criteria**
- **Consequently FMEL should not have been invited to tender, for what was to become H801/802.**

If the PAC fails to **forensically examine/interrogate** how FMEL qualified from the PQQ stage the **PAC will be in dereliction of its remit to ensure that public money is spent efficiently and effectively by the Scottish Government.**

- The **RECC inquiry 'Construction and procurement of ferry vessels in Scotland'**(publ Dec 2020) did not forensically examine /address the issue
- **Audit Scotland Report :New vessels for the Clyde and Hebrides Arrangements to deliver vessels 801 and 802** (publ April 2022) . Examination of the PQQ stage was specifically excluded from AS' remit .

The PQQ effectively embraced a 3-gate system to qualify to the invitation to tender stage.

- (1) **SCORING MATRIX**

EXCLUSION. THOSE 6 COMPANIES WITH THE HIGHEST SCORES WILL BE TAKEN FORWARD TO TENDER . SITE VISITS WILL NOT BE PROVIDED AT PQQ STAGE. THIS QUESTIONNAIRE MUST BE RETURNED BY NOON ON THE 19 November 2014. INFORMATION REQUIRED FOR INCLUSION IN THE TENDER. REQUIREMENTS STATED AS MANDATORY MUST BE MET BEFORE THE REMAINING ASPECTS OF THIS PREQUALIFICATION QUESTIONNAIRE WILL BE SCORED. INABILITY TO MEET MANDATORY REQUIREMENTS WILL RESULT IN EXCLUSION. THOSE 6 COMPANIES WITH THE HIGHEST SCORES WILL BE TAKEN FORWARD TO TENDER . SITE VISITS WILL NOT BE PROVIDED AT PQQ STAGE. THIS QUESTIONNAIRE MUST BE RETURNED BY NOON ON THE 19 November 2014.

The PAC should demand CMAL submit the scoring matrix to the PAC for its forensic scrutiny.

- (2) **EVIDENCE OF THE ABILITY TO PROVIDE THE STAGED PAYMENT REFUND GUARANTREE**

*The ability to provide staged payment refund guarantee from a suitably accredited bank is sought for this project as a **MANDATORY MINIMUM REQUIREMENT**. The guarantee must be in place before work starts. Please provide an evidentiary statement in the form of a letter from your bank confirming their willingness to provide the guarantee if requested to show you can provide this requirement.*

Linking to (1) to (2), as the BRG was a mandatory requirement ,it was incumbent upon CMAL to request this evidentiary letter to initiate the scoring matrix, thereby offering efficacy of its own PQQ.

- (3) **PROVISION of a PARENT COMPANY GUARANTEE or a BANK GUARANTEE**

43 If requested, would you be willing to provide either a parent company guarantee or a bank guarantee? If you cannot provide any of these assurances, and it is determined by CMAL that your financial strength is not adequate then your company may not pass the financial evaluation. If you can provide the assurances as detailed above, CMAL may explore these options with you before determining whether your company can be taken forward in this procurement exercise as per the Guideline on Financial Health of Suppliers.

PAC should require CMAL to advise what steps ,is any ,it took with regard to provision 43 of the PQQ ..

With ref to (2) and 3),the PAC should enquire if CMAL a/o SG-TS, deemed that these PQQ provisions were waived, a/o by default ignored, jointly a/o severally, by virtue of SG-TS ,only ca 8 weeks prior ,vesting FMEL with a contract to build a 3rd Hybrid Ferry

This raises the obvious Q. What BRG , if any ,was in place between FMEL and CMAL re this 3rd Hybrid Ferry?

This has relevance view Erik Østergaard's evidence to the PAC at its 30 June Meeting:-

The Convener :- **Have you ever known a ship to be built without a builder's refund guarantee?**

Erik Østergaard:- **Not that I recollect.**

Re the 3rd Hybrid Ferry;- It would appear that no BRG was in place .

CMAL Board Minutes Oct 2014 record :**Hull 727(Hybrid 3) TD advised that included in the meeting pack was the final version of the voted loan letter and letter of comfort. TD updated members, that providing there was no challenge, the contract would be awarded to Ferguson Marine Engineering Limited (FMEL) on Monday the 3rd of November.**

The ref to a letter of comfort **indicates that NO BRG was in place with FMEL for this 3rd Hybrid ferry order .**

If CMAL had not submitted its request for the evidentiary letter from FMEL's bank, and no BRG was in place for Hybrid 3, then a precedent was in place with FMEL, that the BRG requirements of the tender may be negotiable, a/o may be varied, in the event that FMEL progressed to the ITT stage.

This conforms to Derek Mackay's response (Feb 2015), to the circuitous correspondence initiated by FMEL (Dec 2014), that FMEL could not provide the BRG as stated in the tender.

Erik Østergaard was the Chairman of CMAL's Board when this 3rd Hybrid ferry order was placed.

FINANCIAL STABILITY :- FMEL as a 'new start' could not provide the mandatory documentation of Part C of the PQQ:-
PART C : Information regarding economic financial standing

Kevin Hobbs' in evidence to the RECC inquiry stated, inter alia:-

Financial stability is part of our assessment and, fairly obviously, if we believed that a shipyard was financially unstable, we would discount it. However, that was not the case for any of the bids that we saw.

SG-TS, and by default CMAL, must have deemed FMEL to be financially stable to place the order for Hybrid 3 in Sept 2014, ergo **Part C, a mandatory requirement, as applicable to FMEL, must have been waived. But by whom?**

It would have been politically and commercially untenable, ca 8 weeks later, for SG-TS-CMAL, to deem FMEL financially unstable, and block FMEL's progress from the PQQ stage to the ITT stage of the tender .

[The time-line of SG-TS-CMAL placing the order for Hybrid 3 overlapped the tender's PQQ stage]

This has added significance in that only 10 days after completing the PQQ stage of the tender, the FM was cutting the first steel for the 3rd Hybrid at FMEL, and stating :- ***"I'm also very happy to see FMEL getting down to business..... This will help them show that they are a competitive and attractive option to future clients"***.

CONTRACT LAW :- CMAL's defence of what may have been lack of due diligence during the PQQ stage viz a viz FMEL, and the BRG, is primarily based on a perception of contract law that:- *'unless there is a comment to the contrary you accept that the framework that you are putting forward within the four corners of the contract is accepted'* . **But the PQQ was not the contract.** The PQQ predicated the shortlisting of 6 companies invited to tender for a potential contract. A BRG requires 3rd party agreement ie the tenderer's Bank. A Bank may not agree to the exact wording of what was a draft proforma BRG.

As indicated in amended BIMCO Newbuildcon standard newbuilding contract.ct

What amendments were to be considered?. Possibly amended wording of the BRG?

- **It was an imperative, that CMAL requested the evidentiary letter from any potential tenderer's Bank.**
- **The PAC must establish why CMAL chose not to request the evidentiary letter from FMEL's Bank .**

It is reasonable to assume that ,as the **PQQ stage was concurrent with SG-TS's letter of comfort finalising the contract for this 3rd Hybrid ferry**, that any such evidentiary letter from FMEL's Bank, re the BRG, may prove negative.

By not seeking the evidentiary letter, did CMAL send out a wrong message? Did FMEL assume, that by being invited to tender, that the BRG terms of the tender could be varied and possibly resolved with a letter of comfort as with Hybrid 3?

Summary :

This submission is solely with reference to the PQQ stage of the tender process.

It makes the case, and reasons, for the PAC to forensically examine/interrogate how FMEL qualified, from the PQQ stage, to be invited to tender, for what was to become H801/802.

Notes re 3rd Hybrid Ferry Order

This hybrid ferry was not in the 2013 Ferry Plan, nor CMAL's 10 yr Strategic Plan 2014-2024. [Holland House Electrical, owners of Fergusons since 1995, had been been lobbying SG for months, prior to its going into administration, to secure such an order.](#) There is no evidence of its pending order in CMAL Board minutes..

Following Fergusons going into administration (15 Aug 2014) this order was hinted, by John Swinney, to the Scottish Parliament (19 Aug 2014)

SG-TS presented the 3rd Hybrid ferry order to CMAL, as a fait accompli (29 Sept 2014) only 14 days after CBC had completed the purchase of FMEL (15 Sept 2014) The very short ordering period suggests that no BRG had been demanded a/o required of FMEL (see above).

This 14 day contract negotiating period is in stark contrast to the eight week period, to resolve the BRG issues of the H801/802 tender ie from FMEL being awarded preferred bidder status (20 Aug 2015) to the final contract award (16 Oct 2015). This was resolved in Oct 2015 with SG-TS issuing a letter of comfort to FMEL, as per the precedent established on ordering Hybrid 3

[Evidence suggests an option may have existed ferry as part of the the original order placed in 2011 for a 3rd and 4th Hybrid ferry](#)