

# New Vessels for the Clyde and Hebrides

## Further written submission from Robert Trythall, by email 26 May 2022

The two major reports on this ferry saga have been :

- (1) **RECC Report** : **CONSTRUCTION AND PROCUREMENT OF FERRY VESSELS IN SCOTLAND**
- (2) **Audit Scotland (AS)** : **New Vessels for the Clyde and Hebrides**\_Arrangements to deliver vessels 801 and 802

Neither report investigated in detail ; - (1) the PQQ ( Pre-Qualification Questionnaire) stage of the Tender process, which dictated selection of tenderers to be Invited to Tender(ITT) and (2) investigated the stage between ITT and CMAL recommending FMEL as the preferred bidder.

### TIME LINE

**15 Oct 2014** : PQQ was issued at the same time as the Tender with same closing date 19 Nov 2014

**8 Dec 2014** : Foll posted by CMAL P;public tender w/site *PQQ Evaluation is slightly delayed. We will issue the results in the very near future. Thank you to all participants for their patience*  
( Obviously by 8 Dec 2014 something has gone wrong namely an awareness that PQQ and ITT cannot close on the same date )

**10 Dec 2014:** Six shipyards were issued with invitations to tender for the contract with 31 March 2015 the deadline for submission

**Dec 2014:** Date unknown. FMEL initiated dialogue via Stuart McMillan MSP to Scottish Government (SG) initially to John Swinney who passed it to Derek Mackay . The dialogue addressed '*the question of refund guarantees or "bonds*

**2 FEB 2015** : The reply from Derek Mackay to McMillan stated inter alia:

*While CMAL's Board, in line with standard industry practice, has a preference for refund guarantees it has on occasion taken alternative approaches to ensure that ship yards, including Ferguson under its previous owners, were not excluded from bidding for these government contracts.*

Did Mackay copy document copied to Transport Scotland (TS) a/o CMAL ?

The PQQ stated inter alia :

**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.**

and

*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*

also

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.

The ref to a **suitably accredited bank** is significant . Who/What defined '**suitably accredited bank**' .

The required guarantee could only be negotiated **after** a preferred bidder award.

**Hence it had been mandatory to secure an evidentiary letter at the PQQ stage to ensure the 'quality' of any subsequent guarantee from any party invited to Tender .**

The PAC must require CMAL ( also possibly TS) to advise the status at the PQQ ie pre-ITT stage of:- (1) any evidentiary letter from FMEL's Bank and (2) correspondence with FMEL/CBC re a parent company guarantee .

Irrespective, following FMEL being announced as preferred bidder, it is self evident that at the PQQ ie pre -ITT stage of the tender process:-

- **FMEL was not able to meet the BRG mandatory requirements, nor able to provide a parent company guarantee**

De facto this was substantiated by FMEL's initiative in Dec 2014 to address this very issue with SG .

**Prime Facie , FMEL should have been excluded from the tender process, and not Invited to Tender .**

Therefore at the PQQ-pre ITT stage :-

- Was CMAL in breach of due diligence in not pursuing the evidentiary statement from FMEL's Bank, a/o the parent company guarantee ?
- Had there been an intervention on FMEL's behalf to waive the BRG mandatory requirement of the PQQ ,to facilitate FMEL to the ITT stage ? Had DM's letter 2 Feb 2015 been copied to CMAL?
- Was FMEL given a bye into the ITT stage ? (Note CMAL at the time had a build contract with FMEL (Catriona)

**31 March 2015** . The tender was called for 31 March 2015 . Derek Mackay (DM) along with John Nicholls , Graham Laidlaw, and Chris Wilcock from Transport Scotland attended a CMAL Board Meeting on the 31<sup>st</sup> March 2015 In view of SG, and specifically DM's earlier correspondence re *the question of refund guarantees or "bonds"*, surely DM would have thought it prudent to raise the issue with the CMAL Board at this 31<sup>st</sup> March Board meeting ?

**17-31 Aug 2015** Please refer to this extract from the RECC report:

*An evaluation of the tenders was submitted to the Board of CMAL on 17 August 2015. Four of the submitted tenders were judged not to be potential candidates, leaving three tenders, including that submitted by Ferguson Marine, to be considered. On 20 August 2015, a submission to Scottish Ministers recommended approval of the award of the contract by CMAL to FMEL. The submission indicated that: FMEL was the highest quality bid received but also the highest price. Taken together, the FMEL tender achieved the highest overall evaluation score. The same submission to Ministers included an assessment of the risk of unsuccessful bidders for the contract mounting a legal challenge to the decision to award the contract to FMEL and the prospects of any such legal challenge being successful, concluding: As with any procurement, a legal challenge from one of the unsuccessful shipyards cannot be discounted. CMAL have not identified any particular risks in this regard and, in any case, are confident that any challenge can be defended. That said, the relationship between Scottish Ministers and Ferguson's owner is well known.*

Also this extract from from CMAL's Board minutes 25 Aug 2015 referring to :

*2 x 100 metre vessel meeting with CFL, CMAL and TS on the 27th August.*

- It beggars belief that in the March 2015 -17 Aug 2015 tender evaluation process, that a non-compliant tenderer with regard to a primary contractual stipulation ie guarantees, could become short-listed .
- It beggars belief that these various meetings between 17-31 Aug did not address the possibility of a non-compliant tender being awarded preferred bidder status

I dispute Audit Scotland's defence( see further comment below ) :- *All bidders were required to accept the terms of the draft contract or to provide comments or amendments to the draft. Some of the bidders provided comments. FMEL did not, thus implying that it accepted the contract terms.*

Commercial prudence dictated a review, prior to any declaration of preferred bidder status, that the Dec 2014 mandatory PQQ stipulations were still deliverable 8 months later. Irrespective, a successful negotiation,post preferred bidder status, had still to take place with the preferred bidder's Bank , to reach mutual agreement of the wording of the guarantee .

In this regard the NEWBUILDCON states that the guarantees be '*substantially in the form and substance set out in Annexes A(i) (Instalments) or A(ii) (Performance) as stated in Box 19(a)(ii).* **The wording of the guarantee was indicative.** It required to be negotiated and agreed with 3<sup>rd</sup> party, the provider's Bank. CMAL had to provide a reciprocal guarantee. Both parties retained the right of withdrawal until mutual agreement

The anxiety re a legal challenge can only refer to the possibility that the tender terms may have been altered to the advantage of a one of the tenderers eg guarantees,/giving FMEL a bye into the ITT stage

The statement;- *the relationship between Scottish Ministers and Ferguson's owner is well known* is pregnant with significance

**Was their a lack ,a/o absence, of due diligence by CMAL a/o TS from the pre-ITT stage through to announcing preferred bidder ?**

## Supplementary :

I am a retired shipping professional . The H801/801 tender process, and its award, lacked elemental shipping negotiating norms. Audit Scotland's (AS)report was naive in this respect

**A)** AS in its report states **17. All bidders were required to accept the terms of the draft contract or to provide comments or amendments to the draft. Some of the bidders provided comments. FMEL did not, thus implying that it accepted the contract terms.**

All shipping negotiations are based on a draft or proforma contract/charter party. Negotiations are always subject to terms and details of any such draft or proforma contract/charter party. Initial, and substantive agreement, is reached on agreeing main terms ,but always subject details. Thereafter the latter are negotiated to agreement. This can be an attritional clause by clause negotiation.

Nothing is, or can be implied. Agreement is reached negotiating on **an accept/except basis**

Was it clearly stated in the ITT that '*All bidders were required to accept the terms of the draft contract or to provide comments or amendments to the draft*' ? Was a log kept of bidders comments a/o amendments . Was a log kept of any CMAL response? **By inviting comments or amendments to the draft contract suggests no contract term could be deemed an implied term.** AS implies that the absence of any comment or proposed amendment in the ITT period deems the tenderer to have accepted the contract terms without alteration. This is commercial nonsense . The final agreed contract clearly shows agreed alterations to the draft contract .These would only be negotiated and agreed after a preferred bidder award

**(B)** The PQQ made reference to : **invitation to tender package will also contain a draft shipbuilding contract. (BIMCO NEWBUILDCON standard newbuilding contract or similar.** But the tender stated :

### SECTION III: LEGAL, ECONOMIC, FINANCIAL AND TECHNICAL INFORMATION

#### III.1) Conditions Relating to the Contract

III.1.4) Other particular conditions to which the performance of the contract is subject  
As indicated in amended BIMCO Newbuildcon standard newbuilding contract.

The PQQ , is at variance with the tender by stating or '*similar*' ie the contract draft document had not been decided

Irrespective the ref to '*As indicated*' implies the **particular conditions** were subject to negotiation

Such negotiation is confirmed in the heavily redacted, and limited extract of the NEWBUILDCON contract ( ddt 16 Oct 2015) to build H801/802 as posted on SG's Ferguson Documents website .It shows ( 1) altered terms in the body of the NEWBUILDCON contract document ( 2) eleven additional clauses , and (3) three additional annexes.

**(C )** I robustly dispute AS' statement re the shipbuilding industry status of the BIMCO New Build Contract (NEWBUILDCON) as being *used throughout the shipbuilding industry*. **It is not.** It is a 2007 document. What preceded it ? Usually a lawyer drafted contract . Norwegian yards and Norwegian shipowners agreed a joint shipbuilding contract ("**SHIP 2000**"). Japan derived its own contract **Shipbuilders' Association of Japan (the "SAJ Form")** .With the emergence of S Korea and then China , Asian shipbuilders used their own contracts, based on the SAF Form.

Re CMALs recent contract with CEMRE;- Turkish shipbuilders use their own, form which in turn maybe based on a standard form. The BIMCO New Build Contract (NEWBUILDCON)was not stipulated in the tender  
[https://www.inal-law.com/wp-content/uploads/2021/07/2021\\_shipbuilding\\_Turkey.pdf](https://www.inal-law.com/wp-content/uploads/2021/07/2021_shipbuilding_Turkey.pdf)

**(D) Guarantees** :- the NEWBUILDCON states that they be '**substantially in the form and substance set out in Annexes A(i) (Instalments) or A(ii) (Performance) as stated in Box 19(a)(ii)**. Ergo they have be negotiated to mutual agreement,and as they require 3<sup>rd</sup> party provision they can only be negotiated after preferred bidder status.

**(E)** The contrast between the H801/802 tender and the New Islay ferry tender is night and day!

- (1) It does not stipulate the NEWBUILDCON [ see ( c ) above]
- (2) It stipulates **Minimum level(s) of standards required:**  
**Bidders must include a commitment from a 1st Class international Bank that they will be able to obtain a refund guarantee for the full value of all pre-delivery installments.**
- (3) It stipulates significant quality assurance and performance conditions

[https://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=JUN418718](https://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=JUN418718)

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