

Written submission Robert Trythall, by e mail, 21 April 2022

Professional Background : My whole career has been in shipping starting as an Engineering Cadet in the MN , moving on to be the Project Engineer for a major shipping group . This interfaced with, and influenced my gravitation to the commercial aspects of shipping and ultimately owning my own shipbroking company and member of the Baltic Exchange.. I have worked in Norway, Japan and Australia . My career also embraced shipyard new-build negotiations and commercial guarantees . I have been appointed as an expert witness and arbitrator in shipping disputes .

Professional Qualifications : B,SC (Hons) Mech Eng , BA(Hons) History . FICS *, AIArb *
*Fellow Institute of Shipbrokers , Associate Inst of Arbitrators ,

I have made various submissions on ferry issues to Scottish Government and Transport Scotland . Re the FMEL saga I have made submissions to the RECC and NZETC. I submitted a paper to the Expert Ferry Group in 2017 titled:
Norway : Ferry Review What Scottish Ferry Provision Can Learn .

SUBMISSION

I initiated a correspondence with Kate Forbes MSP on the very issue that the Public Audit Committee is now addressing ie the lack of documentary evidence viz a viz the PQQ, and ultimate tender award of H801/802. I have subsequently received a reply from AS (both attached)

Subsequently the FM has been reported to say it is "regrettable" that key decisions around the contract for the Ferguson Marine ferries were not recorded properly, ie missing ,and that Scottish Government (SG) would learn any lessons it needed about record-keeping,

At any level of commerce:-

- Statutory auditing requirements demand such key decisions are properly recorded, and do not go 'missing'.
- and
- SG is not a kindergarten re learning lessons in record- keeping. Is lack of proper record-keeping endemic in SG ?

The documentary evidence 'missing' ,or not in the public domain refers to :-

(1) Proof that FMEL met the PQQ stipulations integral to the Tender process :-

- FMEL failed to satisfy/meet the PQQ stipulation and should not have moved to the Invitation to Tender (ITT) stage of the tender process . The PQQ stated inter alia:-

*44 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*

AS' reply (date) stated: **FMEL passed this pre-qualification exercise and was shortlisted to bid for the contract.** And makes reference to the RECC Inquiry into construction and procurement of ferry vessels in Scotland (Dec 2020) . **But the RECC inquiry did not address these questions :-**

- How was FMEL deemed to have passed the PQQ ?
- At the PQQ stage, what documentary evidence, if any, was offered by FMEL to confirm it could /would fulfill the BRG mandatory requirement criteria ie **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**
- Who conducted due diligence, if any, of FMEL's response to the PQQ ?

AS' reply states:- _

CMAL had been aware that FMEL, as a newly established organisation, would potentially find it difficult to secure the BRGs.

- Was this at the PQQ stage?. If so, why did CMAL not conduct due diligence at the PQQ stage ?

There is a complete lack of any documentary evidence, in the public domain, as to what scrutiny ,if any, was made of FMEL's ability, a/o capacity to meet, the PQQ stipulations to qualify to be Invited to Tender .

It is my submission that FMEL did not meet this PQQ primary stipulation re bank guarantee a/o FMEL misrepresented their capacity to meet this primary PQQ stipulation . Consequently I do not accept SG's 'lack of record-keeping' as a valid explanation, as to why there is no documentary evidence to support FMEL meeting the qualifying criteria to be invited to tender for these ferries .

(2) FMEL's premature award of 'preferred bidder' status by SG (31 Aug) :-

- (a) arose from lack of a/o absence of due diligence during the tender appraisal process
or
- (b) may have been derived from an unstated SG agenda to ensure the tender be awarded to FMEL.

Re (a) please refer to this [extract from this document in what I call the the Ferguson Papers](#))

You will recall that we had a meeting with our Minister at the time, Mr. Keith Brown, on the 5th. of August 2014 in respect of the delays of the Loch Seaforth where the Minister highlighted our obligations - also in respect of future newbuilding contracts - to thoroughly exercise due diligence to safeguard part that future vessels were delivered on time, on spec and at the stipulated costs and with proper penalties and guarantees. [REDACTED]

AS' reply to my correspondence with Kate Forbes MSP stated :-

CMAL's Invitation to Tender documents also made the BRG requirements clear. CMAL report that FMEL's bid for the contract (which was anonymised during the evaluation process) gave no indication that full refund guarantees were available

Re 'anonymising';- this suggests that during the evaluation process that CMAL did not know the identity of the party they were evaluating. If so when was FMEL's identity known to CMAL?

Irrespective CMAL knew before 20 Aug 2015 which party had 'won 'the tender. The documents confirm that prior to 20 Aug 2015 that dialogue between FMEL and CMAL had taken place on aspects of FMEL's tender submission .
(<https://www.gov.scot/publications/ferguson-marine-key-documents-2015/>)

Why was the BRG , a main tender contract term not addressed during this dialogue ? Have the minutes a/o associated documents of this dialogue gone missing or never recorded?

It would appear that CMAL may have assumed ,by simply entering the tender, implied a capacity to offer the required BRG, but following Keith Brown's 5th Aug intervention(above) it beggars belief to accept that CMAL did not interrogate the issue, with all tenderers, prior to 20th Aug, when CMAL recommended to SG-TS that the contract be awarded to FMEL.

What record -keeping, if any, was taken of any such interrogation ?

The BRG was a main term tender stipulation then FMEL, or any other tenderer, by not indicating ' *that full refund guarantees were not available* in their tender submission, may have offered prima facie evidence of misrepresentation possibly fraudulent misrepresentation. By extension this would apply to the PQQ stage

This is a brief, but comprehensive submission, to support Stephen Boyle's statement re his "frustration" that all documentary evidence was not available and 'insufficient documentary evidence" to establish why the original £97m order was given to FMEL, without FMEL, or its parent company, providing the guarantees as stipulated in the tender.

In this respect, with regard to SG's deviation from the original tender stipulations, the documents confirm that SG had concerns at the prospect of legal action, by any of the failed tenderers.

The apparent lack of record-keeping suggests :-

- a possible systemic break-down of due diligence process and procedure, by SG and its agencies ,which may have facilitated FMEL's possible misrepresentation of their capacity to meet the BRG stipulations of the tender.
- and
- a possible breach of law as per recent press reportage.
- or alternatively
- a possible cover up of a possible unstated SG objective to award the tender to FMEL.

Conclusion : It is my submission that :

- SG's lack of record-keeping does not show how FMEL met the PQQ primary stipulation re bank guarantee , a/o if FMEL in order to enter the tender, misrepresented their capacity to meet this primary PQQ stipulation,
- SG's lack of record-keeping does not show if FMEL, prior to being credited with preferred bidder status, misrepresented their capacity to meet the BRG tender stipulation
- SG's lack of record-keeping may be a cover- up for SG awarding the tender to FMEL, notwithstanding FMEL's failure ,at the outset, to meet the tender's primary stipulation re the BRG

Consequently, in my opinion, it is incumbent upon the Public Audit Committee to order a fuller review of all the documentation associated with SG's decision to order these ferries at FMEL.

Email to Kate Forbes MSP cc'd Stephen Boyle AS 24 March 2022

++

I have read AS report 'Publication: New vessels for the Clyde and Hebrides' and conseq have sent foll to Kate Forbes MSP
++++
Ma'am

Fergusons /Audit Scotland

I watched your interview with Glenn Campbell on BBC Scotland TV News 22.30 hrs 23/3/2022

Self-evidently you were not around in 2015 when Scottish Government-Transport Scotland intervened on the issue of the required shipbuilders guarantee, thereby forcing CMAL to contract with FMEL, but Messrs Salmond / Sturgeon/Mackay were around, and in the driving seat.

Possibly jointly a/o severally they may be able to assist in finding any document a/o minutes of any meeting on this issue and pass same to AS?

SG-TS inability/unwillingness to present/disclose the relevant document/minute may indicate malfeasance.

In addition to this missing document, also missing from the AS report is commenting on the basic fact that FMEL failed to meet the initial guarantee requirements criteria stipulated in the Pre-Qualification Questionnaire (PQQ) ergo **FMEL should never have moved forward to the invitation to tender (ITT) stage of the tender process**

Whom in SG-TS facilitated FMEL moving into the invitation to tender (ITT) stage of the tender process?

Once more you and other Ministers attempt to deflect criticism and defending your actions

Ref to (1) 'saving jobs' (2) securing the yards future etc etc

re (1) **Labour** .Please refer to any of the FMPG updates .. local labour has not been there to be recruited see latest update <https://www.fergusonmarine.com/media/1323/fmpg-update-letter-to-nzet-230322-final.pdf>

(2) **The yards reputational damage is terminal.** Note AS comments re essential shipbuilder guarantees Has it dawned on anyone in SG-TS that had FMPG secured any of orders it was ostensibly pursuing that the latest delays to H801/802 would have resulted in breach of contract issues re delivery etc and as such the shipbuilder guarantee would have been called-in ?
SG-TS has to wake up to commercial realities .

++++

I request AS to comment as to why AS did not examine the Pre-Qualification Questionnaire (PQQ) stage of the tendering process , as FMEL did no meet the mandatory economic/financial criteria and as such not have progressed to the ITT stage.

This is as pivotal as any ' missing' doc re the guarantee issue

I look forward to your response

Response from AS 20 April

Dear Mr Trythall

Thank you for your email regarding why we did not examine the PQQ stage of the tendering process for the 801/802 project. As is our policy, your email was passed to Audit Scotland's correspondence team to respond on the Audit General's behalf. We have shared your correspondence with the audit team.

As you will be aware, during 2020, the former Rural Economy and Connectivity Committee (RECC) conducted an inquiry into the procurement of the two vessels. Its report, published in December 2020, set out very clear and critical findings on the procurement process – for example concerns with CMAL's due diligence and the way the bids were assessed. The Scottish Government's formal response to the RECC's report (in January 2021) stated that CMAL had already made improvements to its procurement processes – for instance undertaking additional diligence and financial monitoring, and obtaining support from independent architects to assess bids. These improvements are set out in more detail in part 4 of our report.

In light of this, we did not think it would add value to repeat the work of the REC committee in this area. Our starting point was the announcement of FMEL as preferred bidder as this is when significant project risks were first raised. It seemed appropriate to start the audit at this point by considering what actions were taken to mitigate those risks and how those risks influenced how the project was managed.

Although we did not include the procurement process in our audit, we reviewed some of the procurement documentation to support our understanding of the project. CMAL's PQQ makes it very clear that the a Builder's Refund Guarantee (BRG) was a mandatory requirement. FMEL passed this pre-qualification exercise and was shortlisted to bid for the contract. CMAL's Invitation to Tender documents also made the BRG requirements clear. CMAL report that FMEL's bid for the contract (which was anonymised during the evaluation process) gave no indication that full refund guarantees were not available.

I hope you find this information helpful.