

From: McLaughlin AC (Ainslie)

Sent: 07 May 2018 11:38

To: Cabinet Secretary for Finance and the Constitution

Cc: First Minister; Minister for Transport and the Islands; Permanent Secretary; DG Economy; Chief Financial Officer; Brannen R (Roy); Rollison R (Richard); McAllan M (Mary); Nicholls J (John) (TRANS); [REDACTED]; Maxwell S (Stewart) (Special Adviser); McCaig C (Callum)

Subject: CMAL Procurement Review

[REDACTED]

I have attached a copy of the summary of the review of the procurement process undertaken for the contact to construct 2 new dual fuel ferries.

The review team found no material issues with the procurement process. From the tender document it was clear throughout the procurement process that the contract was for the design and construction of 2 new vessels with the risk for the design development being passed to the contractor. There was no evidence to suggest that this was not understood by all bidders; and pre-contract documentation suggests that FMEL were aware of the risks they were accepting at the point of award.

The review findings have not been shared at this stage with CMAL. Subject to Mr Mackay being content it would be our intention to pass a copy of the report to them in due course.

Ainslie

Procurement ‘pulse-check’ of CMAL contract with FMEL

1. As requested, we attended CMAL’s offices in Port Glasgow on 2 May 2018 to conduct a quick review of the procurement process leading up to the award of the contract for hull nos 801 and 802 to FMEL.

Top lines

2. **Within the limited scope and extent of the review we were able to carry out:**

- **We found no evidence to indicate that there were any problems or areas of concern arising from the procurement process,**
- **We found no evidence to indicate that at the point of contracts being signed there was a lack of shared understanding between both parties as to what was required under the contract (to the contrary, we found evidence that both parties understood what was required).**

Limitations and conduct of the review

3. The ‘review’ necessarily amounted to a quick overview – the procurement documentation consisted of several thousand pages of technical details. We clearly did not have the time or indeed the technical expertise to examine much of this in any detail.

4. We met initially with Kevin Hobbs, CEO, and Jim Anderson, Director of Vessels, and over the course of an hour and a half asked them to talk us through the process as they saw it.

5. We then had the opportunity to review the following documents:

- Outline Business Case;
- Contract notice;
- Technical specification/Invitation to Tender;
- Clarification questions from all bidders and CMAL’s responses;
- FMEL’s tender;
- A list of post-tender clarifications to the specification agreed between CMAL and FMEL;
- Standstill letters issued to the bidders; and
- Contract documentation.

6. We were able to establish to our satisfaction that it was clear that this was intended to be a “design and build” contract. This was clear both from the fact that from the start the documentation was entitled “design and build” and that despite some elements of the requirement being very detailed (down to the requirement for toilet brushes in crew quarters, for example), the naval architecture, i.e. how all these components come together in a ship which meets the speed and efficiency requirements, was not defined.

7. Neither the volume of clarification questions submitted by bidders nor their content suggested a fundamental lack of understanding of the requirement by the market.

8. When questioned, Jim Anderson was of the view that the time allowed for the return of tenders was entirely standard and reasonable for a project like this. One bidder requested that the deadline be extended by a month, and this was agreed to. He also explained that the technical evaluation was carried out by a team of people with appropriate professional qualifications and experience.

9. Early in the contract document, the Builder’s Obligations are set out in some detail. These obligations state clearly that the Builder is responsible for design and build. The Obligations include compliance with the requirements of the Classification Society Lloyds of London. Indeed, the Invitation to Tender document made clear that the specification did not detail all requirements and the tenderer was to provide a full detailed specification for all areas of the vessels, as indicated in the ITT itself.

10. Though we clearly are not in a position to understand the technical detail, FMEL’s bid appeared to us to be comprehensive. It also appeared to cover the issues

which have subsequently become contentious in some detail. This reflects Jim Anderson's view, expressed to us, that FMEL's bid was one of the most detailed he had seen in his career.

11. Indeed, the contents of FMEL's tender submission, including additional detailed answers to clarification questions in areas such as fuel consumption at both 14.5 and 16.5 knots, propeller design and model tests, form the backbone of the contract which was eventually signed.

12. The contract used was a BIMCO standard form of contract, which we are told is the industry norm. The ITT asked bidders to make clear any comments they had on the draft shipbuilding contract, and the FMEL bid stated that they had no comment to make on the contract at that time. The contract includes clear mechanisms allowing CMAL to request changes to the design, FMEL's duty to minimise any additional costs incurred as a result, and their right to recover those additional costs through the contract.

13. The tender competition was conducted through the 'Restricted Procedure'. Under normal circumstances, the Restricted Procedure gives limited scope for changes to the nature of the stated requirement. In this exercise there appears to have been relatively lengthy discussions between parties after FMEL was identified as the 'Preferred Bidder' and before signing the contract. These discussions resulted in a reduction in the contract price. While this is not necessarily indicative of any error or breach of process, there are other procedures which may be more suited to this type of dialogue; the Negotiated or Competitive Dialogue procedures may have given further scope to test and ensure a shared understanding of the requirement. However, the fact that the tender process followed the Restricted Procedure could be seen as a signal to the market that the contract would be that of a design and build as opposed to one that necessarily required further dialogue/negotiation between the parties.

Conclusion

14. Though the brief nature of our involvement and indeed our lack of technical expertise in this industry means that our findings must not be taken in any sense as giving a 'clean bill of health' to the procurement process, we found nothing which gave us any cause for concern, and indeed we formed a view that there appeared to be a very good shared understanding of the contract requirements and the allocation of design risk therein.



4 May 2018