



OFFICIAL REPORT
AITHISG OIFIGEIL

Public Audit Committee

Thursday 8 September 2022

Session 6



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PUBLIC AUDIT COMMITTEE

21st Meeting 2022, Session 6

CONVENER

*Richard Leonard (Central Scotland) (Lab)

DEPUTY CONVENER

*Sharon Dowey (South Scotland) (Con)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Craig Hoy (South Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Derek Mackay

David Middleton

Graham Simpson (Central Scotland) (Con)

CLERK TO THE COMMITTEE

Lynn Russell

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament
Public Audit Committee

Thursday 8 September 2022

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Richard Leonard): Good morning. I welcome everyone to the 21st meeting in 2022 of the Public Audit Committee. The first item on our agenda is a decision on taking business in private. Do members agree to take agenda item 3 in private?

Members *indicated agreement.*

Section 23 Report: “New vessels for the Clyde and Hebrides: Arrangements to deliver vessels 801 and 802”

09:01

The Convener: The second item on our agenda is consideration of the Auditor General for Scotland’s section 23 report entitled “New vessels for the Clyde and Hebrides: Arrangements to deliver vessels 801 and 802”. I welcome David Middleton, who is our first witness this morning. In 2015, he was the chief executive of Transport Scotland.

David, the committee appreciates that time has elapsed since you left your role at Transport Scotland. However, you were the most senior official at Transport Scotland when key decisions to award the contract to Ferguson Marine Engineering Ltd were made, and there are questions that we need to ask and that we need you to answer. Before we proceed to questions, I invite you to make a short opening statement.

David Middleton: I will make a short opening statement—indeed, perhaps just a few remarks, which are not really about the substance of the issue.

To follow what the convener said, I believe that members are aware that I have had exchanges with the committee’s clerk about the basis of my appearance before the committee today. For the record, I should say that I have been retired from full-time public service for over six years. I left office as chief executive of Transport Scotland in early November 2015, just after the contract award. That was nearly seven years ago. Therefore, I am not in a position to offer opinions or answers that are based on any professional position that I currently occupy.

I have had no access to support for this appearance, and I have had the opportunity to review only those documents that were copied to me at the time when I was chief executive. I have had no advice or steers from former colleagues beyond points of fact, so my main basis for responding to any questions is recollection.

I fully understand the public concern about the unfinished ferries and, if there are issues that I can assist the committee with, I will do my best. I have seen the Audit Scotland report and have followed the committee’s proceedings to a degree, not least because my name has been mentioned from time to time—that does get one’s attention—but I have not had the opportunity to study every document or every sentence of the committee’s consideration.

As I said, if I can help in any way, I will do my best.

The Convener: Thank you, Mr Middleton—we appreciate that. The deputy convener of the committee, Sharon Dowe, has questions to put to you.

Sharon Dowe (South Scotland) (Con): Good morning, Mr Middleton. The Auditor General for Scotland stated that there is “a mismatch” between Caledonian Maritime Assets Ltd’s

“strength of feeling about the scale of risk”—[*Official Report, Public Audit Committee, 28 April 2022; c 41.*]

involved in awarding the contract to FMEL and how that was communicated to ministers. As the accountable officer for Transport Scotland at that time, what role did you have in providing advice to ministers?

David Middleton: I had no direct role. To clarify, did the Auditor General say “mismatch” in his report or in something that he said separately?

Sharon Dowe: He said that in evidence to the committee.

David Middleton: CMAL had a view of risk, and concerns came to light. My director of the relevant part of Transport Scotland was working on those matters, and he and his officials worked through those issues and produced the submission, which I think people are aware of, that reported to ministers the risks that CMAL perceived. They reported the extent to which CMAL had negotiated some reduction in risk with Ferguson’s and the ways in which we felt that we could offer reassurance and comfort to CMAL. I was kept aware of those developments and I saw the papers that were prepared in the relevant directorate in Transport Scotland, but I did not personally participate in the discussions or in any discussions with ministers.

Sharon Dowe: So you did not have any meetings with CMAL.

David Middleton: I had no meetings with CMAL.

Sharon Dowe: Do you feel that the strength of feeling from CMAL about the preference for a builders refund guarantee was fully conveyed to ministers?

David Middleton: I think that it was fully conveyed to ministers and that the Audit Scotland report said that. I do not think that anyone doubts that the submission of 8 October—if I am right—set out that position very clearly. It included a number of documents and gave the directorate’s perspective on the issue.

Sharon Dowe: From CMAL’s submissions, it seemed very keen to go back to the procurement

process because it would have preferred to proceed with a full builders refund guarantee. Why were ministers so keen to proceed with the contract at that time?

David Middleton: I think that ministers understood that Ferguson’s came out on top of the procurement process regarding cost and quality. Once the issues relating to the builders refund guarantee came to light, there were extensive discussions between Transport Scotland and CMAL about how that could be dealt with. I think that part of the covering advice that Transport Scotland put to ministers at that time—I say “ministers”, but it was to Derek Mackay, whom I know you will speak to later—outlined the fact that some officials in CMAL had said that we might run into problems in other respects.

What we discussed with CMAL, and what CMAL helped to prepare, was the form of reassurance and comfort about where risk would lie. That was what gave CMAL the confidence to accept the contract. I know that CMAL had doubts about that. Nonetheless, it participated in the process that drafted the letter of comfort that gave CMAL the opportunity ultimately to enter into the contract.

Sharon Dowe: I know that some of my colleagues have other questions about that. When did you become aware that there would not be a full builders refund guarantee?

David Middleton: I cannot remember precisely. That emerged in the period between the announcement of the preferred bidder at the end of August and some point in September. I cannot tell you the precise date in September on which I became aware of that.

Sharon Dowe: So you were not aware of that prior to the contract being awarded.

David Middleton: There were discussions after the contract award. I honestly cannot recollect. Regarding my reading of the documents, I was not formally aware until some time after that stage.

Sharon Dowe: Okay.

The Convener: I will pick up on that point. Was Transport Scotland present at the CMAL board during that August to October period?

David Middleton: I think that the record would show that John Nicholls and a colleague went to the board meeting on 25 September. That is my understanding.

The Convener: And on 25 August as well.

David Middleton: Okay.

The Convener: We have minutes that CMAL submitted to us that show that.

David Middleton: I accept that. If that is what is in the minutes, that is what is in the minutes.

The Convener: Based on what you have just said, I am a bit confused, because the papers for the CMAL board meeting on 25 August referred to the problem with the builders refund guarantee. That is item 13 on the agenda for that meeting, at which Transport Scotland officials were present. Surely you, as the accountable officer, would have been aware of that major stumbling block.

David Middleton: I was asked about when precisely I was aware. I cannot go back and say precisely when I was aware. You say that the CMAL board papers say that and that Transport Scotland officials were aware of that at that time. Not everything is instantly reported to everybody in Transport Scotland. I certainly became aware of the builders refund guarantee issue and of the extent to which officials in the directorate were trying to deal with that issue during that period. However, if you are asking about a precise date and about why I did not know that that was in the CMAL board papers, I cannot give you a satisfactory answer. I became aware as that period unfolded.

The Convener: There was quite a crucial date in or around that period. On 20 August, five days before the CMAL board meeting, during which the builders refund guarantee was discussed as a major issue, Keith Brown, as Cabinet Secretary for Infrastructure, Investment and Cities, was told by a Transport Scotland official to approve the preferred bidder award to Ferguson Marine. Given that, on 25 August, there was knowledge of an issue around the builders refund guarantee, surely that was known on 20 August. If so, why was that not communicated to the cabinet secretary?

David Middleton: Honestly, it is probably simplest to say that I cannot answer that, rather than dissembling. The submission of 20 August was about advising ministers on the outcome of the procurement exercise and who had come top on price and quality. The builders refund guarantee became an issue as the process developed, after the identification of the preferred bidder.

I cannot go back in time to 20 August. You asked why that issue was not known by 20 August, given that it was known by the board on 25 August. I am sorry. That is the problem in operating alone, going back and looking at papers. I cannot give you an answer.

The Convener: Okay. However, would you not expect it to be quite well known, during that period, that CMAL had identified what was a major problem with the contract, as it was outlined by Ferguson Marine?

David Middleton: It is not unusual for issues to develop in procurement. I appreciate that the ferries remain unfinished because of things such as the builders refund guarantee, which is, essentially, a financial transaction. However, there was still widespread confidence that the yards could build the ships. In procurement, it is not uncommon for there to be issues for discussion even after the identification of the preferred bidder. Negotiations and discussions go on. That does not mean that the builders refund guarantee would have been a showstopper at that time.

The Convener: Okay. Our time is limited, so I want to move on to the issue of written authority, about which you said in your written submission to the committee that you

“did not then, nor now, see this as any kind of ‘decision’.”

What did you mean by that?

David Middleton: You asked me how I decided. People do not decide whether to seek a written authority. If they think that they are at all in the territory of requiring a written authority, that is an extremely rare event. I would not like to say how many of those there have been in post-devolution Scotland, but I gather that the numbers are tiny. They have been more prevalent in Whitehall, for other reasons, and they have been the subject of journalistic comment. However, that is another matter.

I did not have to sit and stroke my chin and say, “Oh gosh, should I seek a written authority?” I did not have to seek a written authority about anything, because I was not in the position of thinking that we were going into something that I regarded as unwise. If I had thought that it was unwise, difficult and problematic, there would have been a whole matter for consideration. Ultimately, the first port of call would have been a serious discussion with ministers.

The whole point was to find a way forward, which is why we ended up with the October submission, which advised ministers of the risks, as CMAL asked us to do; of the mitigations that CMAL had negotiated with Ferguson Marine; and of a further way in which we transferred some of the financial risk, as CMAL had asked, so that it would be “harmless”—I think that that is the word that it used in its written submission.

I had no reason to seek a written authority. In a sense, the main thing was that the matter was written up and put to ministers so that they were fully aware of all the facts and positions. That is why the documents from CMAL—both the longer one, which came in early October, and the previous documents—were put to ministers. That was to make sure that ministers had before them all the issues in writing.

On the notion that an accountable officer, as I was, would ask, straight off, for an instruction or direction—in all my upbringing, that is how a written authority was usually referred to—because of issues that came to light, that simply was not the way in which one’s mind worked.

09:15

The Convener: However, you know that the Scottish public finance manual says:

“The essence of the Accountable Officer’s role is a personal responsibility for the propriety and regularity of the finances under their stewardship”.

So the buck stops with you, does it not?

David Middleton: It did indeed but, ultimately, I was not saying that I regarded the contract as unwise or poor value for money or that entering into it was a poor judgment. We still had the outcome of the procurement, which told us that it was the best bid for price and quality, and we had secured some negotiations of risk from CMAL to Ferguson’s and from us with CMAL. Therefore, I did not see how I was exposed, and I do not think that the Auditor General’s report said anywhere that I should have sought a written authority. That is why I do not see any reason to review that now.

The Convener: Well, the vessels are five years late and two and a half times over budget, so maybe that is a reason why you should reflect on it.

I will bring in Willie Coffey.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Good morning, Mr Middleton. I will ask a few questions about that area as well.

Up to the point where the approval was given, there was clearly concern about the contracts, and it did not lead to anyone asking for written authority or ministerial direction, so there must have been some kind of assurance process that enabled you to recommend to ministers that they proceed with the contract. That seems to be missing for members of the committee and the public. What happened to take us from concerns to feeling able to recommend proceeding with the contract? What did the assurance process that enabled that advice to be given to the minister look like?

David Middleton: The process was as I have outlined. I am sorry if it has been unclear. Discussions between Transport Scotland officials and CMAL went over the ground. CMAL sought to negotiate some of the financial risks back from the extreme position that Ferguson’s perhaps took at the outset—the 25 per cent and other matters that are outlined in the Auditor General’s report.

Some of the financial issues were negotiated with Ferguson’s, and then CMAL made it clear that it was still uncomfortable but that it wanted assurances from Government that, if we proceeded, it would not be left exposed. Therefore, to render CMAL “harmless”—I think that that is the word that it used in its written submission—we drew up a letter of comfort as well as considering our standard loan letter.

That correspondence was drawn up in consultation with CMAL and other parts of the Scottish Government—procurement, the legal directorate and the financial directorate—and we believed that that provided us with sufficient basis to say to ministers that they were able to proceed but that, in proceeding, they must be aware of the risks that had been identified. However, those risks were primarily financial. I do not think that anyone raised the issue of the vessels not being completed or not being built. No one suggested that the yard would somehow be incapable of building the ships.

I understand the point that the convener put to me a few minutes ago that it is not a satisfactory situation. However, you are asking me to put myself back into the period of August to October 2015. As far as we were concerned, the papers that we put to ministers on, I think, 8 October covered the ground as far as we were able to do so on risks with Ferguson’s and how we were giving comfort and reassurance to CMAL that it would not be exposed. That was all put to ministers so that they could decide whether they were content to proceed.

Willie Coffey: I ask you to clarify that all the key players in the process were content—perhaps not happy, but content—that the risks with which we were presented were manageable. At that stage, everyone was content to make a recommendation to proceed. Is that correct?

David Middleton: Well, everyone within Government. I understand that CMAL has expressed its views—and I am not seeking to disparage any views that it has expressed. The word “content” might not be one that it would use, but it accepted the reassurances and the letter of comfort, which it was involved in drawing up, and it entered into the contract.

The Convener: Craig Hoy has some questions to put to you.

Craig Hoy (South Scotland) (Con): Good morning, Mr Middleton. I want to look deeper into the issue of the builders refund guarantee and Jim McColl’s account of the discussions that he undertook with—he said—the Scottish Government and CMAL in developing a bid, in which, he says, you knew that they were not in a position to offer a builders refund guarantee. That

is documented in an exchange of letters between Stuart McMillan and Derek Mackay in February 2015, in which it is intimated that it would be possible to proceed without a full builders refund guarantee. What was your awareness of that correspondence?

David Middleton: I have to be honest: I have no recollection of that correspondence, and it was not in the pile of material that I was to re-read. It was not in that pile. My recollection is zero. If someone did a trawl of the documents and proved that I had seen that correspondence, then you have me bang to rights, but my recollection is zero and I did not see that in the pile of documents, so my awareness of that exchange between Derek Mackay and Stuart McMillan is not in my recollection at all.

Craig Hoy: The letter of February 2015 has not been formally released to the committee, but it has been quoted in the press. Among the reports of that, Mr Mackay gives reassurance to Mr McMillan that it would be possible to proceed without a builders refund guarantee. Mr Mackay says that CMAL had, on occasion, “taken different approaches”. Are you aware of any “different approaches” in relation to that fundamental issue of a builders refund guarantee regarding any prior procurements?

David Middleton: I could not quote you any. I know from some of the documents that I re-read that it was quoted from some of my officials that a letter of comfort had been given in previous instances. I think that that has been stated. However, I cannot quote you those instances, because I do not have access to people who could research the matter and advise me on it.

I did read, in the pile that I was permitted to look at again, a reference to a letter of comfort having been used in the past. As to whether that letter of comfort was used directly in relation to the builders refund guarantee, I do not have the papers or advice to be able to answer that—I am sorry.

Craig Hoy: You have mentioned financial risk. There was an element of political risk in the decision, in that the contract was being awarded to a well-known businessman who was aligned to the Scottish National Party, the party of Government, and to the independence cause. What were your thoughts at the time about awarding such a high-profile contract to such a figure, who was clearly known to have connections to the party of government?

David Middleton: We are not politically naive, I hope. To the extent that there was a motivation to see the contract awarded, if it was possible to do so within the bounds of risk and propriety, it was simply that Ferguson’s was a well-known producer in Scotland, in a part of the country that had had

its economic difficulties. If there was an underlying motivation from our part to try to secure the award of the contract, it was because the importance and significance of Ferguson’s was well known and well understood.

On the politics of the Jim McColl angle, we understand the point about the awareness of that, but that was not at the forefront of our minds at all.

Craig Hoy: You would concede, however, that there was some degree of political risk in proceeding.

David Middleton: I am not sure that I am the best judge to offer a view on the political risk. If we can say that there was a procurement process that had Ferguson’s as top for quality and price, then that is the best defence against any suggestion. There could be no suggestion that the minister, as a politician, was trying to influence us towards Ferguson’s just because of the influence of Mr McColl.

Craig Hoy: CMAL expressed concerns to this committee about the razzmatazz and fanfare around the announcement of the preferred bidder status. Obviously, it thought at that point that that almost locked in the deal and that it would bind its hands in future negotiations. Did Transport Scotland advise Scottish ministers to perhaps consider a more discreet way to achieve the milestone of preferred bidder status?

David Middleton: Not specifically, no. We regularly deal with preferred bidder status and the outcome of procurements. If you understand the significance of the point at which everyone is informed, the problem with Alcatel letters—especially in a competition where you might have five or six parties involved—is that, when you issue letters, you tell quite a lot of people. Ministers conducting business tend to like to have communications on their terms; otherwise, they get things fed back to them from others who say, “Oh, we have heard such and such”. Minister X or minister Y then says, “Well, I didn’t know anything about that”.

I understand the point that Mr Hoy is making, but it was not uncommon—indeed, it was relatively common—in relation to other contract procurements for preferred bidder status to become known and therefore for ministers to seek to publicise that on their own terms. We understood that that had become part and parcel of procurement outcomes.

Craig Hoy: This was not just issuing letters; this was “Lights, camera, action!” with the First Minister. Given that you had not got there yet and there was still the unresolved issue with the builders refund guarantee, did you have any concern that you were going to compromise further negotiations?

David Middleton: I do not think that the negotiations were compromised. Obviously, there was razzmatazz; you have just asked me about political awareness and the wider politics and, in some ways, one can understand that. However, there are plenty of times when there is post-tender negotiation and post-outcome negotiation. Contractors are not always in business for charitable purposes and they often come back at various stages to try to negotiate things; indeed, once contracts are under way, contractors can come back and try to negotiate things. I therefore do not think that the publicity in and of itself prejudiced anything, but I am not suggesting that I do not understand why some in CMAL might have felt uncomfortable. Perhaps we were more used to it.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I will probably cover a little bit of ground that others have covered but from a different angle. In your submission of 24 June 2022, you state:

“I do not think there was ever any suggestion of CMAL requesting a written Ministerial authority”.

Would it have been you who would have advised CMAL if a written ministerial authority was required?

David Middleton: That depends what you mean by “advised”. I am sorry—I will not try to dodge the question. What I am saying is that they could well have come to me and asked that and I could well have discussed it with them.

Colin Beattie: Did they do so?

David Middleton: No. They did not come to me to ask for my advice.

Colin Beattie: There was no real advice given in this particular case as to whether any sort of direction was required. Please correct me if I am wrong but, from what you are saying, it was just a routine process with a sign-off from the minister. Is that correct?

David Middleton: It was routine but high profile and with a number of sensitivities, which we have discussed this morning. I wrote my submission in response to the committee’s questions on 24 June 2022. As I discussed with the convener a little bit, I have in my head that written authority represents the very, very rare event—I hesitate to use the term “nuclear option”—of seeking an instruction or direction. So, when you ask me whether CMAL considered that, it was never in my head at the time that they were seeking that. They were seeking other things—they were seeking reassurance, transfer of risk and letters of comfort. They were not saying, “We will not do this under any circumstances and the only way that we will do it is if we get a direction”, whatever that meant

in precise terms for a non-departmental public body. That would have raised quite a lot of questions in my mind.

Colin Beattie offered the word “routine” and, clearly, it was not routine; there were quite extensive discussions about how we managed risk and presented it to the minister in a way that we judged made it acceptable to proceed.

CMAL has expressed its own views. I saw its submission and its appearance after I wrote to the committee. It clearly had stronger feelings about whether it was, in effect, instructed. CMAL’s written submission says that it “was effectively instructed”; it also referred to being told not to ask for a direction, which I do not really understand.

09:30

I do not think that, in legal terms, we issued—and the Auditor General’s report does not say that we issued—an instruction or a direction. Whether CMAL could have thought differently about the processes that it might have followed, and whether it might have come to me and talked further about that, or talked to others, I really cannot say.

I gave an unequivocal response to the question that the committee posed to me in writing because, at the time, the understanding in my mind was that CMAL was not seeking anything analogous to what I would call, in my mind, a written authority, which is an instruction or a direction that is really quite heavy duty.

Colin Beattie: So, as far as you recollect, that was never discussed.

David Middleton: No.

Colin Beattie: Not within your—

David Middleton: No, not within my ambit. I have heard the reference to “shareholder instruction”. If that is how things are perceived—well, it is for others to say. CMAL itself was involved in drawing up what I think was what we called, within our ambit, the letter of comfort—the letter of reassurance. It was not a direction or an instruction.

Whether the terminology of referring to us as a shareholder made it effectively a shareholder instruction, I will leave others to judge. In our minds, however, we were not setting out to direct anybody, which is what I believe the term “written authority” really means. In my head, it means to instruct or direct.

Colin Beattie: Some of the terminology has been a bit confusing. To continue on that, one fairly important document was Transport Scotland’s submission to ministers of 8 October 2015. Do you consider that that made a clear case for awarding the contract to FMEL?

David Middleton: Yes, I do. It made a clear case that ministers were in a position to authorise the award of the contract, because all avenues had been explored to manage risk in such a way that we assumed was acceptable to CMAL.

Colin Beattie: So, as far as you were concerned, it was not strange that the minister signed off, based on the information that he was given.

David Middleton: No.

Colin Beattie: Okay.

There were differing views, in the evidence that we heard on 26 May and 30 June, on whether the contract award decision was down to CMAL. Do you consider that CMAL was given a direct instruction to proceed?

David Middleton: That is not how I would have perceived it, in my mind. If someone wants to advise me that the letters amounted to a direct instruction, that would be for others to say, but, in our minds, we were giving CMAL a letter of comfort—a letter of reassurance—around where financial risks would lie if certain things unfolded. I did not regard that as having given an instruction.

Colin Beattie: So, as far as you are concerned, the decision on the contract award was down to CMAL—at the end of the day, it was CMAL's decision.

David Middleton: Yes. The Auditor General's report, at paragraph 29, states:

"The CMAL Board accepted those assurances and, on 16 October 2015, awarded the contracts".

As far as I am concerned, that is it.

Colin Beattie: So, as far as you are concerned, there was nothing unusual about the process that was followed. It was high profile, yes, but it was not unusual in how it was handled.

David Middleton: There were sensitivities, and issues that required to be addressed, but we gave assurances. Whether those assurances were out of kilter with a range of other procurements, I would need more time to analyse. I would not say that the process was routine and normal but, in my mind, we were certainly not instructing CMAL.

The Convener: Does Graham Simpson want to come in?

Graham Simpson (Central Scotland) (Con): Absolutely. Mr Middleton, at the start of the session, you described reporting the risks to ministers. Did I pick you up right in saying that it was only Derek Mackay to whom those were reported?

David Middleton: I would need to remind myself of the copy list, but I assume that the

cabinet secretary would have been copied in to that. That would be the normal practice.

Graham Simpson: Did you personally do the reporting?

David Middleton: No.

Graham Simpson: How was it done? Was it by letter or was it a discussion?

David Middleton: It was a written submission of just over two pages, which had a number of enclosures including the most up-to-date paper and previous papers from CMAL, a draft of the amended loan letter from Transport Scotland and a draft of what I am calling the letter of comfort from my relevant director, John Nicholls, to the chair of CMAL. The whole story of risk and how the risk was to be mitigated and the letters that had been agreed with CMAL were presented to the minister, so that we felt that he was in a position to say whether or not he was content to approve.

Graham Simpson: In your recollection and view, those risks would have been reported to Derek Mackay and his then boss, Keith Brown.

David Middleton: Yes, but they were more widely reported to officials across the Scottish Government, including those in procurement, finance and legal, and special advisers would have been involved. It was not a narrow thing; matters were quite well trawled across the Government machine.

Graham Simpson: Which minister—Mr Brown or Mr Mackay—then gave the nod to go ahead?

David Middleton: It was a note from Mr Mackay. I know that that was the note that was not discovered for some subsequent time, and that it was his sign-off to the final deal.

Graham Simpson: Prior to that, of course, was the announcement of the preferred bidder status. Which minister was involved in that?

David Middleton: I have the recollection that Keith Brown had to see that advice in August, because Derek Mackay was away on annual leave. In any portfolio, the practice is that the cabinet secretary decides the issues that he or she will lead on and therefore take direct decisions on, and they also decide which issues are led on by their relevant junior minister or ministers. However, all papers are almost always copied to both offices.

Graham Simpson: I have a final question, convener. What leaps out from the Auditor General's report is that, despite the risks being reported, we do not know why ministers took the decision that they did. The Auditor General said that, when he wrote the report, there was "no

documentary evidence". Do you know why ministers ignored CMAL's reservations?

David Middleton: I do not think that they ignored them; they stated that they were aware of the reservations. My view, and I think that you will have an opportunity to ask about this more directly later, is that Mr Mackay saw and understood clearly the advice of 8 October—indeed, he said some of this in writing, which I think is on your website—understood what was explained to him and how risks had been managed in various ways to mitigate risk to CMAL in particular, and therefore felt able to sign off the approval to award the contract.

The Convener: On that point, one of the final emails in the collection was sent at 5.15 pm on 9 October by Ainslie McLaughlin. It says:

"Just finished my call with DFM. He now understands the background and that Mr McKay has cleared the proposal. So the way is clear to award."

The Deputy First Minister, either as the Deputy First Minister or as the Cabinet Secretary for Finance, Constitution and Economy at the time, was involved right at the point of decision. The email before that says:

"would you drop a note in the system to confirm the absence of banana skins after your call with DFM please".

What would the "banana skins" be?

David Middleton: I think that "banana skins" is a flippant term for anything that might conceivably go wrong. Given where we are with the ships, I do not wish to be flippant about the use of terminology.

The decision had been taken by Mr Mackay. The DFM was finance secretary at the time, and it would be perfectly normal, and not inconsistent with other issues, for the finance secretary to want to be aware of things and to be clear about them. His own officials were on the copy list for a number of the submissions. I appreciate that that might seem, from where you are, to be of great significance. For those of us who were in the system, having the DFM cross-checking at the final stage that he was content and understood what was going on was not abnormal in the context of our business. I do not think that that should lead you down the route of thinking that there was some great clever game going on.

In an organisation in which there is collective responsibility such as the Scottish Government, the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy was an extremely important person. He took an interest in all matters. I do not know what was said in the phone call between the Deputy First Minister and Ainslie McLaughlin, but the DFM wanted some

final reassurance. That was given and there we are.

The Convener: Why did Roy Brannen tell this committee, on 26 May,

"If it was a transport project, it would be ... a decision entirely for the minister"?—[*Official Report, Public Audit Committee, 26 May 2022; c 5.*]

David Middleton: I cannot speak for Roy Brannen. That is, in a sense, true for ministerial decisions. The fact that the DFM takes an interest in matters does not mean that he somehow makes every decision.

If it had been the case—and I am purely speculating here—that Ainslie McLaughlin told John Swinney something and he had thought, "Oh, I don't like the sound of that," I guess that the next thing would have been a phone call between the DFM and Derek Mackay. At that point, either something else would have been done or Derek Mackay would have said, "It's okay, DFM, this is my reasoning," and the DFM might have said, "That's fine; okay".

That is all speculation, but I do not think that it detracts from what Roy Brannen said, which is that transport ministers make decisions about business within the transport portfolio. Whether that decision is made by Keith Brown as the cabinet secretary, or by Derek Mackay as the minister, transport ministers decide things. If other ministers want to query or clarify a point, that can happen. The finance secretary is always an important person, but I do not think that that necessarily dilutes where decision making lies.

The Convener: I suppose that the critical point is about the language used. Mr Brannen told us that it would be a decision "entirely" for the transport minister, but the evidence appears to suggest otherwise. Do you have any final comment on that?

David Middleton: No. I do not think that there is a gulf between what Roy Brannen said and what you note from the record of emails with the DFM, but I understand why you are posing the question.

The Convener: Thank you for your evidence, Mr Middleton. We appreciate your time and your written submission. If anything else occurs to you after you leave the room, or if your recollection expands, do not hesitate to contact us and to put in writing anything that you think would be helpful to the pursuit of our inquiry.

I suspend the meeting to allow for a changeover of witnesses.

09:43

Meeting suspended.

09:49

On resuming—

The Convener: We move to the second part of our evidence gathering today. We are pleased to welcome Derek Mackay, who has given us a written submission and is also here to answer questions that the committee wishes to pose. Mr Mackay, you were formerly Minister for Transport and Islands as well as Cabinet Secretary for Finance and the Constitution, and we might ask you questions related to both roles. First, I invite you to make a short opening statement.

Derek Mackay: Good morning. I thank the committee for inviting me to attend today. I have followed your proceedings and I have read the Auditor General's report and the Rural Economy and Connectivity Committee's findings from the previous parliamentary session. To answer the committee's questions as comprehensively as possible, I have sought access to Government papers that I would have seen at the time as a minister and, of course, I will respect the rules that govern that access.

Much information is already in the public domain or has been presented as evidence so, in being as open as possible, I do not believe that I will infringe any commercial confidentiality or protocol. The Rural Economy and Connectivity Committee has identified catastrophic procurement and management failures. Of course, I take my share of responsibility but, in doing so, I believe that, at every stage and in every decision, I acted with the best of intentions and with the interests of island communities, workers, Scottish shipbuilding and communities that relied on its success foremost in my mind.

As vessel construction entered difficulty, I set out the objectives to complete the vessels, safeguard the workforce and give the yard a future. I do not regret those objectives and I believe that Ferguson's is still operational today—with a future—because of the objectives that were set at the time.

As the convener said, my responsibilities were as Minister for Transport and Islands from November 2014 to May 2016 and, thereafter, as Cabinet Secretary for Finance and the Constitution—and, subsequently, Cabinet Secretary for Finance, Economy and Fair Work—until February 2020.

I am speaking in a personal capacity and I welcome the opportunity to supplement my written evidence by answering your questions to the best of my ability.

The Convener: I will begin by asking you about something quite particular in the written evidence that you submitted to us on 23 June. My question concerns events on 31 August 2015, when an announcement was made that Ferguson's was being awarded preferred bidder status. In your written submission, you said:

"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."

However, the BBC piece, which the First Minister tweeted, quoted her as saying:

"This is an excellent result for Ferguson Marine Engineering Limited and I am delighted to name them as preferred tenderer for the contract".

She also said:

"This contract will see the 150-strong workforce retained and more staff taken on at the shipyard".

On that date, you said:

"This is a significant investment that proves Scottish shipbuilding can succeed in a competitive market".

There is no suggestion that it was anything other than a done deal.

Derek Mackay: At that stage, the fact is that Ferguson's had been identified as the preferred bidder. There were on-going negotiations, so everything would have been subject to those on-going negotiations. Of course, it was not a done deal until the papers were finalised and the contract was signed later in October.

The Convener: I will take you back to 20 August 2015. At the time, you were on leave, but an email was sent to Keith Brown as the Cabinet Secretary for Infrastructure, Investment and Cities. That email covered a range of things, including Jim McColl's position, but it also spoke about presentational issues. The email said that you—as the minister not only for transport but the islands—were the person who was to lead on the announcement that would subsequently be made. However, as we now know, you did not lead on it; the First Minister led on it. Can you tell us what happened in those intervening days?

Derek Mackay: Do you mean from the period of that submission? What period do you mean?

The Convener: How come the First Minister made that announcement at the yard rather than you?

Derek Mackay: On 31 August 2015?

The Convener: Yes.

Derek Mackay: As you have just heard from David Middleton, the former chief executive of Transport Scotland, that was the period when I was on annual leave. That is why that paper,

which was sent to the cabinet secretary to deal with, was approved by him. I am happy to cover the decisions that I have taken, but that paper was approved by the cabinet secretary. I think that I returned from leave that week around 31 August.

Convener, I would like to correct something that you have said previously, which is that I was accompanying the First Minister or that she was accompanying me. On 31 August 2015, I was at Glasgow airport as part of the opening of a pier extension, so I was not at the presentation of Ferguson's as the preferred bidder.

Over the period that you are asking about, I was on annual leave. I think that there was a quote from me in the press release, which you would expect, would you not, from the Minister for Transport and Islands—but during that period, I was on annual leave.

The Convener: Okay. So you were back from annual leave on 31 August, but you were not at Port Glasgow?

Derek Mackay: That is correct.

The Convener: Okay. I will now bring in other members of the committee who have questions.

Craig Hoy: Good morning, Mr Mackay. Thank you for appearing before the committee.

In his report, the Auditor General identified a major issue in relation to insufficient documentary evidence, which has been a concern for the committee. Subsequent to the report's publication, there was documentary evidence to suggest that you were responsible, and a release came out to suggest that you were responsible for taking the decision. We now know who took the decision, but we do not know why.

Do you think that there is still some documentary evidence out there that might give us further information as to why the decision was taken, first to announce Ferguson's as the preferred bidder, and secondly, to award the contract despite the misgivings about a full builders refund guarantee?

Derek Mackay: To be direct, I do not think that there is any further paperwork that was presented to me that relates to that date of the submission on 8 October about the issues, the risks and the decision that I took.

There are volumes of information to do with the matter, as you would expect. I think that it was in December 2019 when, as cabinet secretary, I instructed the release of information so that the Government could be as transparent as possible. However, I do not have the ability to cross check every document that is in the public domain with what has happened over the past few years.

I do not think that there is any further missing documentation about the decision that was taken on 8 October. I have looked at my own records—although ministers cannot retain records, I have had access to Government papers to try to reassure myself that there is no further documentation that I could provide you with.

Craig Hoy: In relation to preferred bidder status, FMEL was a going concern from that point onwards and the contract award was almost seen as a done deal. Before you left on holiday, what was the status of that decision, and would you have approved that had you been in the office, rather than on leave?

Derek Mackay: The period in which I was on annual leave was when the preferred bidder decision was made. The papers for that decision came up on 20 August 2015. As you have heard, Keith Brown made that decision. On my return from annual leave, I considered the papers that came to me.

Craig Hoy: Prior to your going on annual leave, did you get the impression that the preferred bidder status would likely be awarded to FMEL, and that that was the direction of travel? Were you comfortable with that?

Derek Mackay: No, I do not think that there was any suggestion of that. As you would expect, I would have been briefed that submissions would be forthcoming to ministers. However, I was on annual leave, which is just a matter of fact. I was advised that papers would be forthcoming at some point. Of course, the timing of when submissions would have been presented to us for decision was in the hands of civil servants.

Craig Hoy: Were you aware of any Cabinet-level discussions about the decision to award preferred bidder status to FMEL?

Derek Mackay: No. At that point I was not a member of the Cabinet. I was appointed to Cabinet when I became finance secretary in 2016, so I am not aware of what discussions there may have been in Cabinet.

Craig Hoy: But there could have been those discussions?

Derek Mackay: There could have been. That is entirely possible.

Craig Hoy: Did you get the impression that the First Minister was actively involved in the negotiations at that stage, or at least was being well briefed about the discussions about reaching the preferred bidder status?

Derek Mackay: I cannot speak about how much the First Minister knew, other than with reference to the copy lists that I have seen and submissions that were put to ministers, which is largely to

cabinet secretaries, as you have heard from David Middleton, or myself. It is a bit unfair to ask me what information the First Minister may have known, because I do not know what she was briefed on in relation to the preferred bidder status. I cannot imagine that she would have been personally involved, beyond what her ministers were doing on the subject.

10:00

Craig Hoy: The culture of Government appears to be quite tight, so it would be safe to assume that there were channels of communication.

Derek Mackay: There are formal channels of communication, such as Cabinet meetings and meetings with other ministers. As you would expect, as the then transport minister, I would speak to my cabinet secretary and engage with him on matters of importance. Most Government business is conducted through formal channels and through paperwork—communications, submissions, notes and memos—and through the sharing of submissions and responses.

Craig Hoy: Yes. There is an issue here, of course, in that the proposed contractor was somebody who had close personal connections to the independence movement, your party and, therefore, the party of Government. What was your personal relationship with Mr McColl like?

Derek Mackay: Mr McColl was a member of the Council of Economic Advisers and, clearly, a very high profile businessman in Scotland. He was a member of other Government fora. Therefore, that was the basis of my relationship with Mr McColl, as would be the case with anyone of his significance in the business community. When I was Cabinet Secretary for Finance and Constitution, I engaged with him through the Council of Economic Advisers.

Craig Hoy: However, given the widespread media reporting that he was, perhaps, close to the party, did you foresee any political risk in that situation? Could that be one of the banana skins that you wanted to clear?

Derek Mackay: No. Nobody was ever compromised on that matter. The decision to award the contract to Ferguson's was based on Ferguson's bid and nothing else.

Craig Hoy: CMAL said that it did not attend the ceremony for preferred bidder status—which, as we found out today, you also did not—because it was concerned that it would compromise the negotiation position further, critically around the builder's refund guarantee. What is your view on that?

Derek Mackay: I was not aware of that at the time because I was on annual leave during that

period—from the appointment of Ferguson's as preferred bidder until the visit on 31 August. Therefore, in my evidence, I have said clearly that I thought that it had no impact on the negotiations. When I have been asked the question by the committee whether I thought that it had any impact on negotiations, I said no because of the submission that I made in my evidence. Clearly, CMAL has said something different in its evidence. However, the way that it felt, as expressed in evidence to the committee, is not something that I was aware of at the time. That was not conveyed to me. In any event, as I have said in answer to the convener, that is not a subject on which I was engaged because, at that point, I was on annual leave.

Craig Hoy: Obviously, you were not there for the unveiling of preferred bidder status. However, it was said that you would take the lead on that announcement. Subsequently, something changed. Would it have been the First Minister's office's decision to press for that to be announced at a high-profile photo-shoot style event rather than, as Mr Middleton said, through the issuing of the usual contractual letters?

Derek Mackay: Again, you are asking me about something that happened in my absence, and I am not sighted on the exchanges that might have gone on at the time. However, yes—I led on the announcement on the decisions on my return to business. CMAL has provided its view on how the visit came about. As I have said, the decision did not come from the transport minister's office, because I was not there on the day.

Craig Hoy: Are you a bit concerned that you were not there for the awarding of preferred bidder status but that everything seems to have hung on that decision and that there is a sense that, in effect, what happened afterwards was almost a fait accompli? With regard to the position of the Scottish Government and the First Minister, given that these documents have come to light, are you concerned that you are being lined up to be the fall guy—that this is operation blame Derek Mackay?

Derek Mackay: In my opening remarks to the committee, I said that I will take my share of the responsibility and answer robustly for any decision that I have taken. However, equally, I recognise the catastrophic failure at Ferguson's to complete the vessels on time and on budget. That is deeply regrettable. What I do not regret, convener, is protecting the workforce and ensuring that the yard was supported so that it had a future and so that we could support Scottish shipbuilding.

I can answer for my decisions and my involvement. I was a proactive minister and carefully considered all the submissions. I am happy to explain the rationale of every decision while taking my share of the responsibility.

Craig Hoy: Who else has a share in that responsibility, would you say?

Derek Mackay: According to the Auditor General and the Rural Economy and Connectivity Committee in the previous session of the Parliament, there are multiple failings. It does not all rest on me and other people have advised that there are clearly multiple failings in the matter. However, I take my share of responsibility. I was the lead minister.

Sharon Dowey: Good morning, Mr Mackay. Was the decision to award the ferry contract to FMEL in any way linked to political calculations or dictated by a political timescale?

Derek Mackay: No.

Sharon Dowey: In your opinion, it was not.

Derek Mackay: In my opinion, it was absolutely not.

Sharon Dowey: Was an error made in rushing to make the decision to a political agenda? You say that you do not think that there was one, but given the United Kingdom Government's announcement on defence contracts, was making the contract a top-line announcement at your party's conference a political agenda?

Derek Mackay: I say to Ms Dowey that I will resist any petty politics and any comparison with any procurement decisions that the UK Government took about any matter and will stick to answering her questions on the subject. I do not think that there was a political agenda or that the decision was rushed at all; there is no evidence that it was rushed. It was a methodical approach to procurement. I recognise the failure of it, but the decision was made with the best of intentions. Processes were followed.

I do not think that the process was rushed or that it was a partisan decision. It was a decision about trying to ensure that we could get two vessels complete and, as it happens, built in Scotland. It was also about ensuring the future of the yard and growing its workforce, which was a consequence of the decision. There was no partisanship or wrongdoing in it, as is suggested.

Sharon Dowey: We heard from Mr McColl that he thought that there was a future for the yard even without the contract in question and that there was a rush to make the announcement even though the negotiations were still going on. CMAL felt that that hindered it in its negotiations, as it would have been harder for the Government to pull back from that announcement after having made such a high-profile announcement that the contract was going to the yard. I will move on.

Derek Mackay: Can I answer the question, convener? Charges have been put, and I am happy to answer.

The Convener: Yes, I am happy to let you answer.

Derek Mackay: To be honest, I do not believe that anything was rushed. In fact, there were extensions in part of the process, so more time was taken. There was no rush and there was no artificial deadline. I remember saying, once the decision had been taken, "Now let's get on with it." With the decision having been taken, I said that we should move on and act as swiftly as possible.

However, there was no rush to make the decision. There was no rush for any reason. A methodical approach was taken to get the right decision on the procurement of the vessels. There is no evidence that there was a rush. I have not seen the Auditor General or anyone other than Mr McColl say that there was a rush. The evidence shows the timelines and the milestones that were set out to conduct the process properly.

Sharon Dowey: I disagree. I think that it would have been possible to have waited until you came back from your holidays for you to sign the contract, rather than Keith Brown signing it while you were on holiday.

Derek Mackay: As a point of fact, convener, ministers do not sign contracts. If we are going to be absolutely factually correct, I will be absolutely factually correct.

The Convener: Keith Brown was asked to approve it, though, was he not?

Derek Mackay: Yes, but that is different from signing it. I am being clear about signing, because I saw that there was a lot of parliamentary debate around who signed the contract. Ministers do not ordinarily sign contracts.

Sharon Dowey: On that point, who signed the contract?

Derek Mackay: It would have been officials from CMAL because, ultimately, CMAL was leading the procurement process on behalf of Transport Scotland and the Scottish Government. For FMEL, its directors would have signed.

Sharon Dowey: When the contract was awarded, did you know that CMAL had concerns about it being awarded to FMEL? Were you aware of how much concern it had?

Derek Mackay: The submission to me on 8 October comprehensively outlined CMAL's concerns. That submission was a request to me to consider the information that had been presented and, crucially, to give authorisation to proceed. It outlined CMAL's concerns, which were primarily—in fact, its concerns were really only—about the

builders refund guarantee. I will happily talk through the rationale of how I believed that those risks were mitigated.

The submission to me outlined that the request from me as minister was to proceed—it was not to revisit, reject, go through an options appraisal or restart the process; it was for a recommendation to give CMAL the necessary authorisation to proceed. Having raised all CMAL's concerns about the lack of a full builders refund guarantee, the submission then outlined the ways in which those fears could be allayed. It talked about it being the “best deal” in the circumstances and how we could best address CMAL's concerns. It said that Government lawyers had been advised and were content, and that SG finance and procurement had fairly assessed the risk. It spoke about how similar problems can arise even when a full builders guarantee is in place and, ultimately, it asked whether I was content to proceed.

I was, because—as you heard from David Middleton and his successor as chief executive of Transport Scotland, Roy Brannen—the information that was submitted showed that there had been progress from the worst point of negotiations between CMAL and FMEL to a far more satisfactory position, so much so that CMAL, as we heard subsequently, co-produced the note that came to me. It co-produced the risk assessment that came to me as a submission requesting my authorisation to proceed with the process. I am happy to go into more detail as to what was in that submission.

Sharon Dowey: So, at that point, you were not concerned that you did not have the full builders refund guarantee.

Derek Mackay: Of course I was concerned, because the paper gave reason to be concerned, but it also gave mitigations to be taken into account in order to make a balanced decision, which is exactly what I did. The paper was asking for my recommendation in the affirmative: it asked whether we had permission to proceed. My interpretation of that was that the matters under negotiation had been resolved at the point at which I was presented with the submission, because of the narration of the issues and the reassurances in it.

Elsewhere in its evidence, I have seen that CMAL claimed not to have put in a recommendation, positive or negative. In subsequent evidence, it said that it did not really want to award the contract. However, the paper that I was considering asked for exactly that—authorisation to proceed. Notwithstanding the concerns that CMAL had raised, I felt that there were the necessary mitigations to address those concerns.

I am also aware that a full BRG is not the panacea; it does not ensure that there will be no issues in either the procurement or the build-out. Looking at the note, it is curious that it did not suggest that Ferguson's was incapable of building the vessels, or even that there was a high risk that the vessels would be late or that the contractor would not perform. The risk was around the financing—the builders refund guarantee—because FMEL was a relatively new financial entity; however, the shipyard was already well established and had been producing vessels for the CalMac fleet.

I was looking at the assessment, the history, the confidence in the yard and the fact that the evaluation exercise showed that FMEL came out as the top bidder, overall. Therefore, there were a lot of reasons to have reassurance from and confidence in the submission that had been put to me.

Of course CMAL was concerned—it was right to be concerned, given that it felt that, as a corporate organisation, it would be carrying a lot of risk. That is a fair concern. That is why Transport Scotland, with the support of ministers, offered that letter of comfort, which, as you have heard in evidence, was co-produced. It was co-produced to the point that Transport Scotland thought that it was recommending to me that approval be given to proceed. You now have two former chief executives of Transport Scotland confirming that and, for completeness, the director general in the equivalent of economy at the time. That was the understanding of the submission that was put to me.

Sharon Dowey: There still seemed to be a lot of concerns from CMAL, which felt that it had maybe been forced into it.

Given all the different concerns that were raised with you, did you discuss those with other ministers or cabinet secretaries, or with the First Minister or her advisers? Were they aware of the concerns?

Derek Mackay: No. There are two points there. First, you said that CMAL “felt ... forced”—those are the words that you used.

Sharon Dowey: Aye.

10:15

Derek Mackay: I can see how you might get that impression from the more recent evidence that the committee has had from CMAL, but I refer you to the evidence that it gave to the REC Committee, whose report states:

“Asked directly whether the Scottish Government or Transport Scotland had ever applied pressure—either directly or indirectly—for CMAL to award the ferries

contract to a particular bidder, Kevin Hobbs was categorical in his response that this had not happened and that the contract had been awarded to FMEL purely based on an evaluation of the quality and price of its bid and its past reputation.”

I would challenge some of the evidence that has emerged from CMAL, based on what it has said before.

I did not have discussions with other ministers because I did not think that that was necessary at the point of the submission on 8 October. I received the advice, I considered it and I was satisfied with the advice for the reasons that I have given. Therefore, I informed my private office to proceed and that I was content with the paper that I had received.

Sharon Dowey: A letter from you to Stuart McMillan suggests that CMAL had been comfortable to proceed with other procurement and ship builds without a full builders guarantee, which Erik Østergaard said in his evidence was not true. Can you say more about that letter? Would you be willing to share it with the committee? Do you have a copy of the letter?

Derek Mackay: The issue about correspondence between me as a minister and an individual MSP at the time is that former ministers are not allowed to retain Government papers, so I am not in a position to share anything that is not already in the public domain. Of course, I am more than happy for the communication to be released by whoever has it. I have no difficulty with that. I would be breaching rules of access to correspondence that I had access to in a restricted environment if I then shared that, but I would be quite happy if that communication was released. That gives me no difficulty whatever.

If I can, I will explain what the communication would have been doing. An MSP made an inquiry to me—in fact, the letter was to the Scottish Government; it was to the cabinet secretary, John Swinney—about FMEL, or Ferguson’s, and the procurement process, and I was responding. I responded in the terms that would have been drafted for me. The way in which ministerial correspondence works, as I am sure you are aware, is that an MSP writes to a minister, a draft letter is produced by the civil service, it is either amended, approved, rejected or whatever and then it is sent to the member.

I was satisfied that the information that I was sending to the MSP at the time addressed a concern that they had. I responded as minister to an individual MSP, and I think that that is what you would expect of a minister. That is a confidential communication between a minister and a constituency MSP, but if people wish to share that and there is permission to do so, I have no difficulty whatever with that.

The Convener: Can I pick up on that? You have already told us that you were a “proactive minister”, so I do not think that it is satisfactory to rely on a civil service draft as a reason for that letter going out, which said that the builders refund guarantee was a preference—it said that although the CMAL board had

“a preference for refund guarantees it has on occasion taken alternative approaches”.—[*Official Report*, 17 May 2022; c 11.]

Jim McColl told us:

“That gave us the green light to go ahead and put the resources in to put in the tender. There is a lot of work that goes into tenders and we were not going to go ahead and do all of that if we were not going to be allowed to negotiate a different form of guarantee.”—[*Official Report, Public Audit Committee*, 16 June 2022; c 5.]

How appropriate do you think it is, in the middle of a tender process, for you, as the minister, to send that kind of letter?

Derek Mackay: In relation to the timing of the letter, the reason why I made the point about the civil service is that, although I signed the letter—it is my letter to a constituency MSP—that letter would have been composed, as those who are familiar with ministerial office will know, by the civil service. As a minister, you receive a draft letter, you often get advice with the communication—the original letter—and you can then amend, reject or send the letter. I sent the letter, and everything in it is information that I would have been advised was true at the time.

It is helpful that, this morning, the committee has heard from David Middleton, who, speaking as someone who was part of Transport Scotland, said that, behind that letter, there would have been background information to the effect that, previously, letters of comfort had been issued. I assume that that was in relation to builders refund guarantee. I could not then go through and ask where else that flexibility was given. The advice that I would have been given at the time would have been that it would be accurate to put that in the letter. It was a letter from me to an MSP. I did not send the letter to anyone else. As a minister at the time, I responded to a member of the Scottish Parliament, based on the information that I had and on the draft, which I would have assumed that officials would have composed accurately and with confidence that its substance could be verified.

The Convener: You have talked about other evidence that we have received, which you think revises the history book a little bit. In your submission to the committee you said that you were

“first aware of the guarantees issue following the selection of preferred bidder”.

However, the correspondence from February 2015 suggests that you were aware of that issue much earlier.

Derek Mackay: No—I think that those are two separate issues. In no way did I get involved in that issue in relation to CMAL’s procurement exercise. The question that the committee put to me was

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

It is true to say that that was after the selection as preferred bidder as detailed in the submission on 8 October. I had no engagement with CMAL in its processes throughout that time, as I am sure that it would confirm. Indeed, CMAL has also confirmed that that letter was not sent to it.

The Convener: But CMAL has also told us that it offered to meet you to talk about its concerns, which were clearly still live and outstanding come that second week in October. Why did you not take up that offer?

Derek Mackay: I say again that I was reassured by the information in the submission to me that the issues had been resolved and that the recommendation that was being put to me was in the affirmative. It was to give the authorisation to proceed—not to reject or to reconsider.

The co-produced submission to me had the risk analysis. Incidentally, when ministers consider decisions, a risk analysis is often involved; there is a risk of challenge in most decisions that a Government takes. However, I was convinced by the information that I had that there was a satisfactory process. I will not repeat the evidence that I gave earlier on the mitigations, the convincing argument and the tender bid being the best overall. If CMAL’s actual request was not to proceed, that should have been featured in a submission to me. It was not.

The Convener: As you know, it has taken a different view in the evidence that it has submitted to us.

I want to ask a final question before I bring in Willie Coffey. Going back to the letter of comfort and the voted loan, I think that the loan’s value was £106 million, and the value of the tender was £96 million or £97 million. Who was party to decisions about the issuing of the letter of comfort and agreeing to a voted loan of that scale?

Derek Mackay: The submission would have been in on 8 October and the letter would have been signed thereafter by officials. Is that what you are driving at, convener?

The Convener: No. I am trying to understand whether you had to sign off the voted loan decision.

Derek Mackay: The drafts were in the submission on 8 October, so in essence, in making the decision, I had that copied into the pack at the time.

The Convener: Would that have gone to, for example, the cabinet secretary for finance, the Scottish Government’s director general in charge of finance, or the Cabinet?

Derek Mackay: I do not think so. I was lead minister, but such detail would have been dealt with by officials so I do not think that such an annex to a submission would have been sent to others. The copy list of politicians who were involved is on the papers from that time.

The Convener: So you are saying that the transfer of risk from FMEL to CMAL and then to the Scottish Government would have been taken by officials, with no political sign-off.

Derek Mackay: No, I am not saying that at all, convener. You asked about individual officials’ technical—

The Convener: No, I am asking who, to your knowledge, signed off that voted loan decision.

Derek Mackay: The decision is in the correspondence from 8 October, to proceed with a letter of comfort and the financial background that goes with it. I would want to look at the papers to give you an accurate answer.

Incidentally, the papers that I am looking at now are not exclusive—they are in the public domain. They mention the

“draft voted loan letter from Transport Scotland setting out our agreement to fund the two new 100m vessels to be built at FMEL”.

The draft letters are in the 8 October pack of the submission to me. I approved the decision, and further refinement or discussion would have gone on with CMAL and FMEL up to the point of contract award, which was later in October. Does that help?

The Convener: Yes. However, I have a brief question for you. As the cabinet secretary for finance, would you not have been involved in that kind of decision?

Derek Mackay: Not individually with specific elements of that decision. What any finance secretary would have wanted to know was overall budget and the risks that were involved, and I saw discussions around those matters. I am not saying that anyone else would have been engaged in the detail other than the officials who had seen the draft in the submission to me on 8 October. The

copy list includes the then Cabinet Secretary for Infrastructure, Investment and Cities, who was my cabinet secretary at the time.

Of course, one would expect the director general finance, the Scottish Government's legal directorate and the Scottish Government procurement to be involved too, to ensure that everything was in order.

The Convener: Okay. We might investigate that matter a bit more deeply.

I turn to Willie Coffey.

Willie Coffey: Good morning, Derek. I want to unpick a wee bit the nature and substance of the assurance that was given to you to allow you to proceed to award the contract. Was it submissions that said, "We assure you that everything is okay, minister", or were there technical documents in that assurance framework that contained information, technical advice and guidance, evidence and so on? What is the substance of the assurance that you read to enable you to make the award?

Derek Mackay: There was a great deal of reassurance. Some of it said that there would be monitoring arrangements and oversights. Without seeing all the detail of such things, one is reassured as a minister that an assurance framework and contract compliance arrangements are in place—we might come back to the latter point. Enough reassurance existed in the paper to show that mechanisms were in place to hold a contractor to account.

Clearly, when ministers make decisions, officials then get on with their area of expertise. I was quite satisfied with the risk analysis and the mitigation that had been put in place; it satisfied me, in my mind, that CMAL could be authorised to proceed, for many of the reasons that I have already given.

I will reflect on one important thing. The risk analysis said that the risk of lateness or poor performance was low—no one was saying that Ferguson's could not build the vessels. There was more concern around the full BRG. Despite that evidence, the opposite has turned out to be the case: the vessels are late and their construction has—regrettably—overrun, but to this day, no legal challenge to the decision has taken place. CMAL—rightly—expressed concerns, but one makes a judgement based on what one has been presented with.

The key comments in the submission to me were that the deal was

"the best deal that"

could

"be negotiated",

that it was

"broadly comparable with the tender specification",

that legal, finance and procurement were all content, therefore we could "proceed to contract award."

That decision followed the whole evaluation process, during which people talked about how impressed they were by the Ferguson's bid and that it came out on top of the overall scoring, particularly on quality, so I was reassured with the mechanisms within.

Of course, one would expect regular updates. I was not transport minister beyond 2016 and I am quite sure—in fact, I know—that the transport minister would then have been updated on progress. Of course, I re-engaged with the subject as finance secretary because there were emerging concerns about the contract.

Those triggers of concern came into action, and then there were many further issues to be addressed.

10:30

Willie Coffey: I asked Mr Middleton about this earlier. The key players who were involved in giving you that recommendation must have been similarly assured that what they were saying to you was delivered.

Derek Mackay: Absolutely. I think that you heard that from David Middleton, who was the Transport Scotland chief executive at the time. Of course, his successor looked through all the paperwork and picked up the issue on his appointment as Transport Scotland chief executive. They have also given you evidence that that is what they believed that they were advising me. It is for a minister to then make a judgment and decide, and that is what I did.

Willie Coffey: The key component that is perhaps missing in the process is possibly the ability of the yard to deliver the ships. We all know that hindsight is a wonderful thing, but why would there not be in that process some kind of assessment of the yard's ability to complete the vessels on time and on budget? That is what has happened since. Where was the assurance about the yard's ability to complete them? Where was that in the process?

Derek Mackay: It is a fair question. I am sure that the expertise that the yard had would have been taken into account as part of the evaluation of the bid. We should bear in mind that Ferguson's had been constructing vessels for the CalMac fleet for years. Many of the vessels in the current CalMac fleet, ageing as they are, were built at Ferguson's, so it had a track record of delivery.

That was alongside all the information that would have been in the tender.

One of the members of CMAL said that it was one of the best bids that they have ever seen and that it was—I am paraphrasing—of an exceptionally high quality. Of course, there was divided opinion in CMAL, but the bid was referred to as being very strong.

All the evaluation exercises that have to be gone through to get to the preferred bidder status—the PPQ and everything else—would have got us to that point. There was confidence in the yard, because of the case in the bid that it put in and the fact that it had been completing vessels for CalMac, through CMAL as the contracting agency.

Willie Coffey: Can you think of any additional process of assurance that could have taken place that might have helped us to avoid getting to where we are today? What could we possibly have done at that time to try to avoid the circumstances that we find ourselves in?

Derek Mackay: You have a volume of recommendations from the Auditor General and the then REC Committee that helpfully suggest how such situations might be better handled in the future, and I would support them. I am only an individual private citizen, but there are many recommendations on how things could be improved in the future.

A personal view is that transport governance as it stands is not perfect, and it was not perfect when I was transport minister. In its recommendations, the REC Committee makes the point that there is definitely room for improvement in transport governance—the agencies, the structures and so on. Of course, there is the potential to restructure things in such a fashion as to remove that competitive, contractual, conflicting and ultimately hostile relationship that we got into between the contractor and the contracting body, with the Government into the bargain. There are recommendations that have been made by others that should be adopted to ensure that such a situation does not happen again.

The Convener: Colin Beattie has some questions.

Colin Beattie: Good morning. A lot has been made of the possible relationship between Mr McColl and the Government because of his alleged political views. To what extent are contractors' political views taken into account when allocating contracts?

Derek Mackay: Not at all.

Colin Beattie: Are there robust processes to ensure that that does not take place?

Derek Mackay: Absolutely. There is no way that they would be taken into account while a contracting or procurement decision was being made.

Colin Beattie: In your personal case, did you have any communication directly with Mr McColl during the procurement process?

Derek Mackay: As I have said in my evidence, it is very difficult, not having the diaries in front of me, to say how often I met Mr McColl. I would have engaged with him through the Council of Economic Advisers, at diaried meetings and through telephone call arrangements—I think that you have access to all that information, which is in the Government's information release. There was absolutely no inappropriate involvement or preferential treatment for Jim McColl, who has been quite effusive in saying that he does not feel as though he was treated particularly well by the Scottish Government, so I do not think that that would surprise you.

Colin Beattie: It is well known that there were disputes between CMAL and FMEL, which seem to have been fairly extreme. What discussions did you have with other ministers, and what actions did you explore, to try to resolve the dispute and bring the companies together? Mediation did not go anywhere.

Derek Mackay: As I said to the convener earlier, I was a very proactive minister. Even beyond my term as Minister for Transport and Islands, I re-engaged as Cabinet Secretary for Finance, Economy and Fair Work. When it was clear that problems were emerging in the contract regarding the lateness of the vessels and potential cost overruns, there was also a risk to the workforce—to the 400 workers and their families—and to the future of the yard. I was regularly involved, in my capacity as finance secretary and in looking after the Government's finances, in the fulfilment of the contract.

Clearly, other ministers would have been involved. There have been a number of transport ministers—primarily, Humza Yousaf, as Minister for Transport and the Islands, would have been involved at first, and I then would have dealt with Paul Wheelhouse, as minister with responsibility for transport. Of course, I engaged with other ministers to try to ensure that we got a resolution to the difficulties as they emerged. Mediation, expert determination and other interventions proved unsuccessful, in that we could not get them started because of the relationship breakdown and the lack of agreement on remit and a mediator. Ultimately, as you have heard in evidence from others, there was no legal basis on which to proceed, which became a key issue in why further mediation could not be taken forward.

I was proactive in trying to resolve the issues. That led to my being involved, as finance secretary, in other matters, such as the loans.

Colin Beattie: The committee has heard that drawdowns were made against milestones. Subsequent to your departure, in December 2020, there was a report from the Rural Economy and Connectivity Committee, which clearly highlighted that those milestones were—I am not sure whether I am picking the right words here—artificially achieved. A milestone would be picked, such as cutting metal or whatever. Given that that milestone had been achieved—even if all the bits were not in place up to that point—CMAL could claim the money. There was no way that payment could be refused; CMAL took legal advice on that. That is all part and parcel of the dispute. I do not know the extent to which you were aware of or involved in that during that period.

Derek Mackay: CMAL would have largely led on the milestone arrangements at the outset of the contract. I remember becoming involved when the point about the milestone payments was put to me. I am not dismissing what the REC Committee found in relation to the milestone payments, although FMEL and Jim McColl object to and disagree with what CMAL has said on that matter.

My view is that, further down the line, when there were clear issues with FMEL being able to proceed, we had to try to find further flexibility and support to assist with construction, cash flow, the payment of suppliers and so on. Those would have been considerations in my mind at the point of looking again at the milestone payments and at the loan support that the Scottish Government gave directly to FMEL. The original milestone payments were an arrangement between CMAL and FMEL. Of course, CMAL will tell you that what it did was standard; FMEL will tell you that it caused some of the problems. The REC Committee and the Auditor General might have other views on whether that caused problems.

Colin Beattie: Mr McColl said that you had advised him privately that the CMAL board would resign if you interfered in its proceedings. Do you recall that conversation?

Derek Mackay: No, I do not recall that kind of detail. At the time, I would have expressed to Mr McColl—I think that the evidence fairly shows this now—that there had been a breakdown in relationships and that ministers could not interfere.

There has been some reference—you have referred to this, convener—to a “legal position” and to what you now subsequently know thanks to the evidence that has come out in the papers that have been released: there was, indeed, a dispute over both parties’ positions, and both had a different legal position.

You will appreciate, having seen all the evidence and counter-evidence that the committee has received so far, how difficult it was to manage the process and to try to ensure that we kept doing the right thing. I would have expressed frustration with the issue—with the fact that the vessels were late—and said that we were concerned by that. I would have expressed CMAL’s frustration; equally, however, I gave FMEL a fair hearing, because it had a case to make, too, which the committee has heard.

There was a total breakdown in relationships, and I would have expressed that in the meeting. If there was a reason that we could not have proceeded, such as an expert determination or anything else that meant that there was a legal impasse, that was possibly what Jim McColl was referring to.

Colin Beattie: Let me press you on the particular statement that Mr McColl made, which was that you said that the CMAL board would resign. That is fairly dramatic.

Derek Mackay: I think that it is fair to say that, as you have now seen from the evidence, there was, as the process went on, conflict between CMAL and FMEL. I was expressing that there was a relationship breakdown.

There was no letter. I have seen the evidence, and on hearing about that, I checked that there was no letter about resignation from the CMAL board. I do not remember saying that, but I remember expressing concern about all the issues, and about how dissatisfied CMAL was. FMEL was clearly frustrated as well. They were having that dispute, and I was trying to navigate a way through it in the interest of taxpayers, island communities and the workforce at the yard in order to try to find a resolution. I was probably expressing my exasperation at the issue, which I think, having now seen the evidence, you would well understand.

Colin Beattie: You said that you found some governance arrangements to be a barrier to resolving the dispute. Can you give us a little more information on that?

Derek Mackay: Yes. I was referring specifically to the transport governance arrangements at the time. When I was transport minister, I felt that there was an issue with CMAL as an agency, with Transport Scotland and with the contractual arrangements as they were. When problems emerged, I was being advised—for good reason—by a multitude of people, and I felt that transport governance was quite a cluttered landscape at that point.

Of course, when you are, as the transport minister, dealing with the daily issues, you do not necessarily want to embark on structural reform.

We were dealing then with the issues that we were dealing with. Nevertheless, I had for some time held the view that the transport governance arrangements were far from perfect. The Rural Economy and Connectivity Committee came to the same conclusion in its inquiry.

Colin Beattie: On the loan support for FMEL, why did you approve the drawdown of £30 million, which was conditional on the vessels' progress? Progress had not been made—there is clear evidence that the vessels had been delayed already. Given that the funding was linked to progress, what was the justification?

Derek Mackay: That is a fair question, but the Government had a wider responsibility. Of course we had a responsibility to try to complete the contracts, but we had a wider responsibility for the yard, the yard's future and the workforce. For that reason, the Government made other interventions.

I am not entirely sure how much I can speak about the conditions without encroaching into commercial confidentiality, although some of the information is in the public domain. Conditions were attached to the funding, which was provided primarily to help to diversify the business, to secure further work and, of course, to help with the immediate cash-flow issues—workers needed to be paid, convener. I was not going to have a situation in which staff were potentially going to be made redundant, get sent home and not get paid, with all the consequences that that could have had.

10:45

Therefore, the Government had in mind the wider economic and community interests when considering the loan payments. There were conditions and, as part of that process, we appointed an expert to give assurance on the vessels' progress. It turned out that that advice, in addition to all the other advice that I told you about earlier, was challenged and then contradicted by others, such as the nature of the dispute. However, the loans were a specific intervention by the Government, which had wider interests in mind beyond the contract. We were, of course, trying to ensure that the contract was progressed, the vessels were completed, suppliers were paid and work continued, but I was not going to have the workforce sacrificed as part of that process.

Colin Beattie: Although there was fairly solid information to show that the vessels would be delayed, and the payment of the £30 million came with the condition that there had to be progress on the vessels, you took a public interest view rather than simply a literal view of the contract.

Derek Mackay: I took a public interest view, yes, but I also took a wider view. If there was an

industrial difficulty somewhere—I know that the convener is very fond of industrial interventions, and quite rightly so—you would have expected the Government to have got involved whether we had that contract or not, would you not? If jobs and the viability of Scottish commercial shipbuilding on the Clyde were at risk, you would have expected us to get involved.

We have covered matters in relation to the contract, but the loans were given as part of helping the business to diversify and get on with making progress on the vessels. We appointed an independent expert to try to reassure us, because we were getting different messages from CMAL and FMEL about the nature of progress and the nature of the difficulties, so we brought in another independent expert and got another view, and we tried to use that information to help us with the drawdown of loan funding. I have been very clear on the purpose of the loan funding: its effect was to ensure that the business could continue.

I got involved in other industrial interventions, such as at Michelin in Dundee, where the company decided to withdraw. I got involved with interventions there to ensure that Dundee and Michelin had a future, so it is not uncommon for the Government to get involved when there is a risk to business, communities or expertise. If the yard had closed and the workforce had been sent home, I do not think that the yard would ever have recovered.

Colin Beattie: One of the most important things—it is the other side of the coin—was how FMEL spent the money. In your submission, you have a fairly short response on that question:

“Yes, and information was forthcoming.”

What was that information and how was it supplied to you?

Derek Mackay: At that point in the process, we were being advised by the independent adviser and Transport Scotland, and CMAL was feeding information through its sponsor agency. PricewaterhouseCoopers was also engaged in the process; it looked at the conditions, cash flow and other matters. I assume that you will come to the question of what the money was spent on.

Colin Beattie: Exactly.

Derek Mackay: It was spent on wages and supplies. That was my understanding. It is as clear as that. My understanding was that, if we put in those loans, the business could diversify, continue with work and make progress on the vessels, and the yard would have a future. The money was spent in line with that, but on wages to keep people working on the vessels and on supplies so that contractors could be paid, because there were jobs involved in that as well. If the vessels were

successfully completed, the yard would have a future with an on-going programme of work. It was bidding for other work at the same time, which was another reason to keep the yard going in what was a stressful and distressed time.

Colin Beattie: You received the information on that from several different sources. It must have been pulled together in some place. Is there a document that covers that?

Derek Mackay: I recall convening meetings. I convened meetings with all officials who were involved. We would have been advised by Transport Scotland, other relevant officials—whether from procurement or finance—and advisers from PricewaterhouseCoopers. I therefore had briefings with officials. As I said earlier, I cannot go through my entire diaries for 2015 through to 2020—seven years—but there were meetings and updates, and ministers were briefed. I was satisfied, not with the lack of progress, but that the information that Colin Beattie asked me about was forthcoming at the time.

Colin Beattie: Do you want me to carry on, convener?

The Convener: Will you briefly touch on nationalisation, Colin? I will then bring in Graham Simpson.

Colin Beattie: Yes. One of the key points here is that the decision was taken to nationalise the company but full due diligence does not seem to have been carried out, as would normally be the case. Will you comment on the reason for that?

Derek Mackay: I disagree with the premise of the question. As I said, there were numerous meetings with numerous officials and advisers from PwC. Clearly, a point had been reached where all other opportunities and options had been exhausted. I think that much of that information was, in fact, released in December 2019 and is in the Government's information release around the events leading to nationalisation. We whittled down something like 27 options to about three. In the end, there came a critical crisis point at which it looked like FMEL was going to go into administration. The Government therefore had to act if we wanted to safeguard the workforce and ensure that the yard had a future.

As much due diligence as could be carried out was carried out at the time. Clearly, we would not have had access to absolutely everything, but we had enough information. I certainly had enough information to judge that nationalisation was the right thing to do for many, many reasons. The foremost three objectives were to complete the vessels, safeguard the jobs and give the yard a future. In the end, it appeared to be the case that that was the right intervention at the time, and I

still believe that it was. That is why we took that decision. I think that even the Auditor General refers to that in his report. There is no lack of documentation or information around the decision to proceed with nationalisation, and certainly to consider the options.

Colin Beattie: My memory is that the accountable officer—I cannot remember his name—said that only partial due diligence could be carried out. I think that it was said that that was partly due to time and the availability of information.

Derek Mackay: The point is that, as I think I said in my answer to your previous question, Mr Beattie, we carried out as much due diligence as was possible at the time. FMEL would not have been under an obligation to give the Scottish Government and our agencies absolutely everything that we might have chosen to have. In addition, with conflicting reports on the state of the vessels and how long it would take to complete them, it would of course have been hard to come up with an accurate assessment of progress at the yard and where the vessels were without, in the end, having direct control, because of the conflicting nature of information that was forthcoming to Government. Maybe that is what is meant by due diligence, but there was no lack of due diligence, no lack of inquiring into our options and no lack of effort in trying to find the right thing to do.

I will tell the committee exactly what the consequences would have been if we had not nationalised in the fashion that we did that day. FMEL would have gone into administration and workers would have been sent home, which I believe would have severely impacted on the yard's ability to recover in the future. Obviously, workers would have had to find new jobs, so it would have lost that expertise and so on. I therefore felt that that continuity in a crisis was necessary and was absolutely the right thing to do.

Colin Beattie: Given that the decision was taken without a full understanding of the costs and challenges in the company, and in the light of subsequent issues and given its history, do you still think that it was the right thing to do?

Derek Mackay: Nationalisation?

Colin Beattie: Yes.

Derek Mackay: Yes, because it has allowed us to continue the completion of the vessels. Of course, that has taken much longer and cost more than anyone would have liked. However, we were determined to complete the vessels and there was clear advice that, if we started again, it would take longer to do so. We also had to safeguard the workforce, who are blameless in this. As I said earlier, I did not want the workforce to be

sacrificed, so I tried to ensure that there was continuity from one day to the next in the arrangements to continue with the yard's efforts to complete the vessels, safeguard the workforce and give the yard a future.

Incidentally, Mr Beattie, I believe that the yard has a promising future and I wish it well in continuing. However, if the decision to nationalise had not been taken, I would have feared for the consequences for it, notwithstanding the regrettable failure to complete the vessels on time and on budget. I assure you that, throughout, I exhausted every option to try to complete the vessels, support the workforce and give the yard a future through every intervention that I could make.

Colin Beattie: I will leave it at that, convener.

The Convener: In the minutes that are remaining, I want to bring in Craig Hoy briefly, and then I will ask Graham Simpson whether he has a question to put to Mr Mackay.

Craig Hoy: Mr Mackay, you said that all options on nationalisation had been exhausted, but I challenge that. Jim McColl said that he put to you a Queen's counsel's report that showed that a financial restructuring would have meant that he, FMEL and the Government would have split any future risk, potentially saving the taxpayer £100 million. He says that he gave you that report and that you either ignored it or dismissed it without taking legal advice. Is that correct?

Derek Mackay: That is correct, Mr Hoy. He put that proposition to me and to the Scottish Government. Of course, I explored it. There was never anything that I did not explore on hearing sympathetically from anyone who was involved in the issue. The reason why I did not take it forward is that it could not proceed, frankly because we did not have a legal basis to do so.

Some of what happened is already in the public domain—for example, the fact that Mr McColl had one legal opinion and the Scottish Government would have had a different one. As CMAL has advised the committee, it would have taken legal advice regularly. I therefore want to state for the record that I was advised by officials that that proposition could not be taken forward because it would have breached the advice that we had been given.

Craig Hoy: Did you seek an independent QC's legal advice on that or did you just take the advice of officials?

Derek Mackay: No—a legal opinion was sought to inform that advice.

Craig Hoy: Are you certain of that?

Derek Mackay: Am I certain that legal advice was taken to inform that opinion?

Craig Hoy: Yes.

Derek Mackay: Yes.

Craig Hoy: Okay.

The Convener: Graham Simpson, would you like to put your questions now?

Graham Simpson: Good morning, Mr Mackay.

Derek Mackay: Good morning.

Graham Simpson: It is good to see you.

Derek Mackay: And you.

Graham Simpson: I want to go back to the preferred bidder decision. Have I picked you up correctly as saying that you were not involved in that decision at all?

Derek Mackay: The submission on preferred bidder?

Graham Simpson: Yes.

Derek Mackay: That submission went to Keith Brown—yes.

Graham Simpson: Right, so it was his decision and his alone—or was anyone else involved?

Derek Mackay: Well, I was not involved. That is the answer to the question that you put to me. I suppose that you would have to ask others who else was involved in the process. I think that Keith Brown took that decision. As you know, I was on annual leave. I can speak only to the decisions that I have taken; I cannot speak to what other people might or might not have known. You can look at the copy list to see who was copied in to the submissions, but—

Graham Simpson: I accept that you had a holiday, but before you went on it there must have been discussions about the issue. Were you not involved in any discussions?

Derek Mackay: I would have been involved on the state of progress, but I would not have been given an indication that something was about to happen. It would have been indicated to me that a submission was about to come. If a minister is not there, the cabinet secretary can take a decision, and that is what happened. I was not there, so the cabinet secretary took a decision on preferred bidder status at that stage.

Graham Simpson: Okay, so that is nothing to do with you, but what was to do with you was the ultimate decision to award the contract. Can I just be clear that you did know about the concerns of CMAL when you took that decision?

Derek Mackay: Yes. As I have said this morning, I was given a comprehensive briefing on

8 October about the concerns, but also the resolutions to those. Fundamentally, I was asked to give the authorisation to proceed—not to revisit, not to refuse, and not to go back to the start. I was asked to give the authorisation to proceed, and that is what I did, based on all the information that I had before me.

11:00

Graham Simpson: I have one further area to explore. You have already been asked about when things started to go wrong. You had a meeting with Jim McColl in the Parliament in June 2018. At that time, CMAL and FMEL were, let us say, at loggerheads. Jim McColl said that he asked you to intervene and to instruct CMAL to take part in the expert determination process—let us call that mediation. According to him, you said that you could not intervene. Is his recollection correct?

Derek Mackay: I think that I tried to answer that question when Mr Beattie, I think, asked me about that. I expressed concern about the whole issue, but it would not be true to say that I did not make efforts to intervene. I think that I have comprehensively outlined the many efforts that I made to intervene. However, on the issue of mediation specifically, through Transport Scotland—you should remember that it is the Government-sponsored body that engages with CMAL—I encouraged mediation and expert determination. I encouraged all sorts of interventions, including a review of whether the procurement had been carried out properly in house by our procurement officials.

I therefore exhausted every possible option, but—

Graham Simpson: That is not what I am asking you.

Derek Mackay: You asked—

Graham Simpson: I am asking about the specific meeting at which Jim McColl said that you told him, “I cannot tell CMAL to get involved in mediation.”

Derek Mackay: I encouraged CMAL to get involved through Transport Scotland, in discussion with it, in order to try to find a resolution—so much so that CMAL told the committee that in its evidence. In its evidence session, CMAL said that it felt that ministers wanted mediation but that it could not do that, and it then outlined the reasons why it could not engage in mediation. That was because it felt that there was, to use its words, “no legal basis” for that. Therefore, we could not agree the terms of reference for mediation; when those could have been agreed, we could not get a mediator.

However, from memory, fundamentally, the reason why expert determination or mediation could not have proceeded was that the advice was that mediation could not lead to the conclusion that FMEL fundamentally wanted, which was more money for a fixed-price contract, given that CMAL’s view was that that could not and should not be done and that no mediation would sort that. In short, that is why it was felt that mediation could not proceed, according to CMAL. That is what I was advised.

Graham Simpson: Do you agree that this has been a shambles from start to finish?

Derek Mackay: There are two sides to that coin. First, it is very regrettable that the vessels are not yet complete. I look forward to their being complete, of course—everyone does, particularly island communities. I look forward to Ferguson’s at Port Glasgow having a future. Therefore, although, as I said at the outset, I will take my share of responsibility and the situation is regrettable, equally, in every action that I took, I had in mind Scottish shipbuilding, island communities and the workforce. Let us not forget that there was a cross-party campaign to save Ferguson’s in 2014. There is political support for Ferguson’s across the board. However, we, of course, want contracts to be delivered in a way that represents value for money.

What has gone wrong is regrettable, and, of course, lessons must be learned about that. That is why the work of the committee, the work of the predecessor committee and the work of the Auditor General for Scotland is so important. I take my share of the responsibility, but I hope that the committee also appreciates my efforts to do the right thing by the yard, by the workforce and by Scottish shipbuilding so that it has a future. I believe that, if it was not for the actions that were taken by me and others at the time, the yard would not be here today.

The Convener: I have a quick “yes or no” question for you, Mr Mackay. You mentioned in passing the issue of whether it was a fixed-price contract. Is it your belief that it was a fixed-price contract that you approved?

Derek Mackay: Yes.

The Convener: It is. Thank you.

We have received a great deal of conflicting evidence—written and oral—over the past few months. As a committee, it is our duty to try to get to the bottom of that and, I suppose, to exercise a test of reasonableness with regard to what we believe. I thank you for your evidence this morning, which has illuminated some of that situation. On some matters, your evidence has perhaps created more areas where there appears to be conflicting evidence. We appreciate your

willingness to appear before us and your frankness. If, on reflection, there are other issues that you want to bring to our attention, please do not hesitate to do that. Thank you for your time.

I bring the public part of the meeting to a close.

11:05

Meeting continued in private until 11:42.

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