

New Vessels for the Clyde and Hebrides

Written submission from Mr John Sturrock QC, by email 25 April 2022

E mail to the Convener of the Public Audit Committee

“I am following your Committee’s work on the CalMac ferry situation with interest.

I had an article published¹ in the Scotsman on Saturday 23 April exploring a further dimension of what has gone wrong with the ferry contract, by examining the breakdown in relationships and failure to use mediation. I attach the article in its original Word doc form in the hope that this might be useful to the Committee. This also draws on points in a [paper published recently](#) by Reform Scotland on Transforming Dispute Resolution in Scotland more generally, for the benefit of the economy and better use of public money. These are serious matters and I am concerned that, by failing to engage in negotiation and effective dispute resolution at early stages, the public sector may be losing a lot of money.

I hope this might be of some interest to the Committee.”

Kind regards
John Sturrock

Article as originally drafted for the Scotsman

The Auditor General’s recent report on the construction of two CalMac ferries identifies various failures. One critical aspect is the breakdown of relationships between two of the main protagonists, CMAL, the Scottish Government-owned ferry purchasers, and FMEL, the ferry builders, alongside failure to implement the available dispute resolution mechanisms.

An earlier report by the Scottish Parliament’s Rural Economy and Connectivity Committee found evidence of tension, poor communication and, when there were spiralling cost overruns and delays, a deteriorating relationship between the key players which eventually broke down completely. It heard that people could not sit in the same room to have a constructive discussion or sign off on agreed contractual changes, so “things just came to a complete standstill”. The Committee reported “complete hostility and intransigence” and the suggestion that “the failure to achieve sign-off of the basic design of the vessels during the construction phase of the contract and consequently to make proper progress with the construction of the vessels was a direct result of the poor relationship between CMAL and FMEL”.

These are exactly the circumstances in which experienced mediators around the world assist disputing parties to resolve seemingly intractable differences. It seems a

¹ Scotsman, 23 April 2022

shame – and a potentially huge cost to the taxpayer – that mediation was not tried here.

The Committee thought so and expressed the view that “a process of mediation should have been pursued much earlier and more proactively by CMAL and the Scottish Government given both the strength of their concerns and their respective responsibilities as contract owner and project sponsor.”

More generally, the Committee was concerned that the various dispute resolution mechanisms available under the contract “were not exhaustively utilised”. It called for stronger provisions on the application and enforcement of such mechanisms to be incorporated as a priority into any future contracts of this nature, including an appropriate mechanism for a mediator to be appointed. One hopes that these provisions have been introduced in the latest, nationalised, stage of construction.

It is instructive to explore this further. The Auditor General’s report tells us that, for various reasons, CMAL and FMEL did not use the dispute resolution mechanisms available to them. In fact, we are told that: “the contract included a three-stage contract dispute resolution mechanism: Mediation, Expert Determination, and the Court of Session in Edinburgh. In August 2017, FMEL requested that CMAL and FMEL enter mediation. Over the next few months, CMAL and FMEL agreed the draft terms of mediation and identified a preferred mediator. But, in February 2018, both parties abandoned the mediation attempts after failing to agree the terms of reference.” This itself is a curious situation and suggests that the parties were approaching mediation as they would the more formal process of arbitration.

We are also told that the “Scottish Government and CMAL requested on several occasions that FMEL pursue its claim in court. FMEL stated it was not practical to do so as this would have stopped work on the vessels and led to substantial redundancies.” The fact that parties would insist on going straight to court, with all the delay and expense this entails, suggests reluctance to engage in negotiation. Mediation, which is essentially assisted negotiation, does not preclude court action but it does offer the opportunity to avoid its associated delay and expense by informally exploring options, alternatives, costs and realistic outcomes, along with addressing relationship issues. All of this can be done relatively quickly.

We obtain a fuller understanding of what was going on in the Rural Economy and Connectivity Committee’s report, which reveals that, in CMAL’s view, the size of the claim for additional costs was such that... “the only reasonable mechanism for resolving the matter was through the courts.” The Committee was told that CMAL was “unwilling to engage in a negotiated settlement of the dispute between it and FMEL” and that such an approach to resolve matters had been “completely rejected by CMAL”. If so, that appears an expensive approach to adopt. With more constructive engagement, all of this just might have been resolved years ago.

A question arises: has such an approach been taken more widely in public sector contractual disputes in Scotland in recent years? This could suggest lack of understanding of, or perhaps resistance to, what can be achieved through negotiation with or without the assistance of a mediator. Indeed, it has been observed that some public sector officials would prefer that a third party such as a judge or arbitrator rules on a dispute, rather than assume the responsibility

themselves for making decisions, for fear that they may subsequently be criticised, even if that means the resulting process and outcome is more costly. Perhaps this should be explored further.

Looking at this broadly, one of the lessons to be learned about public sector procurement in Scotland is the need to have and use robust processes at an early stage to try to resolve the disputes which inevitably arise in complicated contracts. Nip it in the bud. Around the world, constructive dispute management, involving independent mediators to assist negotiations, regularly saves disputing contractors tens (sometimes hundreds) of millions of pounds of unnecessary expenditure in major projects. It has done so in Scotland in the past. That could have been the case with these ferries. This issue deserves serious consideration by the Scottish Government and by all those with a stake in such large contracts in Scotland, especially where significant amounts of taxpayers' money are involved.

This should be a core aspect of good contracting, risk management and effective governance. Indeed, this could be a missing and yet crucial piece in the latest National Economic Strategy for Scotland. Cut the cost of disputes, prevent them from escalating and you turn wasteful expenditure into productive investment. And dealing with disagreements and disputes quickly and efficiently is also an environmentally friendly choice. It fits with building a greener economy and with aspirations to meet sustainable development goals. It might even have delivered two ferries before now.

Addendum

I also draw attention to the short submission on these matters made by Core Solutions to the Rural Economy and Connectivity Committee during its deliberations. This is reproduced below.

John Sturrock QC, Founder and Senior Mediator, Core Solutions

Addendum

Rural Economy and Connectivity Committee Inquiry into construction and procurement of ferry vessels in Scotland

Call for Evidence

Submission by Core Solutions Group

1. We refer to these questions in the Call for Evidence:

- 3. What actions can be taken, in particular with respect to improved contract management processes, to ensure future contracts of this type are delivered a) on time; and b) on budget?
- 5. How might the experience of the procurement and fulfilment of the current hybrid ferries contract inform the development of an updated Ferries Plan?

2. This submission assumes that there were attempts to negotiate better outcomes at an earlier stage in the duration of the contract and that these failed to produce a satisfactory outcome – or that such attempts were not made or were declined.

3. It is clear that contractual relationships can break down in situations like this. It is equally clear that such breakdown is costly in time, public money and opportunity cost. The result is often a default to unresolved, prolonged impasse, with a zero sum, lose-lose outcome, characterised by delays, polarised positions and adversarial stances. This can result in a serious waste of public money and a serious detriment to all concerned, not least users of the services.

4. Fear may drive many public sector contractual disputes. Fear of failure, fear of loss of face, fear of being blamed. This can result in denial, cover up, protectionism, and a wistful hope that somehow it will all be resolved in the future. Not tackling problems in real time can stoke up worse difficulties in the future. Even when they are trying their best (and most of us are doing so, most of the time), people make mistakes. A blame culture tends to trigger the fight, flight or freeze response and is inimical to mature, constructive problem-solving where the underlying interests of all concerned are addressed. The airline industry discovered this in the nineteen-seventies and sought to change its culture from fault finding to continuous learning, with very substantial long-term benefits. Scottish public sector procurement could be enhanced by adopting such an approach from initial procurement guidelines and requirements through to addressing serious problems when these arise.

5. It is almost inevitable in complex contracts that differences and disputes will exist. Procurement and management of contracts such as these must have provisions for collaborative management and resolution of disputes built in from the outset. This should include early recognition/warning of problems, dispute avoidance mechanisms, a nip-it-in-the-bud approach to (potential or actual) disagreements and effective communication of difficulties as they arise. This also requires competence in negotiation and communication skills that depart from the classic blame/fault-

finding positional paradigm. Training of key staff and managers in these skills and processes – and how to use them - may be essential.

6. The availability of particular processes to address problems early in a non-confrontational, collaborative way could help to address these concerns. Mediation and facilitation already play a valuable role in many public sector contracts, from early intervention to help create an environment in which the project starts on a sound footing, through to providing the means by which serious disputes can be brought to a resolution speedily and cost effectively. There are many helpful examples in the public sector in Scotland in infrastructure, construction, engineering, property, services and other matters.

7. We submit that the provision of independent facilitators or mediators as a standard feature of contract management and dispute resolution should be a requirement in contracts such as these to help to ensure that they are delivered a) on time; and b) on budget. This should also inform the development of an updated Ferries Plan. At the very least, such processes will help to manage and reduce risk and enhance the prospect of cooperation and optimisation of outcomes among contracting parties.

8. We shall be pleased to expand on these submissions if that would assist the Committee in its Inquiry.

Core Solutions is Scotland's leading provider of mediation and facilitation services in connection with high value and complex commercial, public sector and professional services disputes and differences. We have been involved in many hundreds of such situations in the past twenty years and draw on a wide range of experience in making this submission.

John Sturrock QC
Founder and Chief Executive Core Solutions Group