

A REPORT BY THE AUDITOR GENERAL FOR SCOTLAND UNDER SECTION 22(3) OF THE  
PUBLIC FINANCE AND ACCOUNTABILITY (SCOTLAND) ACT 2000

**THE 2005/2006 AUDIT OF THE SCOTTISH FISHERIES PROTECTION AGENCY**

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1. I have received the audited accounts of the Scottish Fisheries Protection Agency for the year ended 31 March 2006. The auditors' report on the accounts is not qualified but I have decided to issue this report to bring to the Parliament's attention events surrounding the unforeseen termination of the procurement of a new fisheries protection vessel.
2. I submit these accounts and the auditor's report in terms of sub-section 22(4) of the Public Finance and Accountability (Scotland) Act 2000, together with this report which I have prepared under sub-section 22(3) of the Act.

**Background**

3. The Scottish Fisheries Protection Agency (SFPA) was established as an executive agency in 1991. It is responsible for monitoring the fishing industry's compliance with UK, EU and international fisheries laws and regulations in ports and at sea. Surveillance of fishing boats at sea is carried out using a fleet of fisheries protection vessels (FPVs) and aircraft.
4. Following a review of its maritime fleet requirements in response to changes in the Scottish fishing scene and the potential for satellite monitoring, the SFPA began a vessel replacement programme in 2003. FPV Minna was delivered in 2003 to replace two smaller inshore launches and one off-shore FPV, and FPV Jura was delivered in early 2006 to replace one off-shore vessel.
5. In November 2004, the SFPA began a procurement exercise to replace the remaining off-shore FPV Vigilant with a Jura II vessel. The invitation to tender included the ability of the SFPA to exercise an option for the successful bidder to build a second vessel (Jura III). The preferred bidder was a Polish yard, Gdansk Shiprepair Yard, Remontowa SA, which at the time was also bidding for the construction of a Caledonian MacBrayne ferry. Subsequent discussions between Ministers, civil servants and the yard resulted in Remontowa SA indicating that it no longer wished to build Jura III due to a lack of capacity. The contract for building Jura II was awarded to Remontowa SA in November 2005 with delivery expected in October 2007.

**Minna-type procurement process**

6. The decision not to proceed with the Jura III option resulted in the SFPA bringing forward plans to procure an additional vessel similar to FPV Minna. As a result of the SFPA's experience with FPV Minna it was decided that the specification for the new vessel should be enhanced from the original FPV Minna to become a 'Minna-type' vessel.
7. The notice indicating SFPA's intention to procure a Minna-type vessel appeared in the Official Journal of the European Union (OJEU) on 18 August 2005. The SFPA initiated the procurement process under the EU Supplies Directive 93/36/EEC 'restricted' procedure. Under the 'restricted' procedure, the contracting authority conducts a shortlisting exercise and a minimum of five candidates are then invited to tender. Because the assessment of candidates and their tenders happen at different stages, the 'restricted' approach is often referred to as two-stage tendering. The alternative, 'open' procedure, is often referred to as one-stage tendering because the assessment of candidates and their tenders take place at the same time.

8. As part of the procurement exercise the SFPA consulted the Scottish Executive's Scottish Procurement Directorate (SPD). During this consultation the SPD questioned SFPA about the adoption of the 'restricted' approach as the 'open' procedure is generally quicker and Ministers expected the tender process would be completed as soon as possible. The SFPA justified its approach, however, because the 'restricted' procedure approach allowed it to start the tender exercise earlier. The 'open' procedure approach requires tender specification documentation to be available from the outset of the procurement process. At this time, SFPA was around a month away from having this documentation ready. It therefore decided to pursue the 'restricted' procedure to allow it to meet the Minister's expectations.
9. The SFPA received 17 expressions of interest by the closing date of 26 September 2005. Three days later, the SFPA provided a copy of the tender documentation to the SPD. The SPD noted to SFPA that various references to 'build location' and 'experience of tenderer' as evaluation criteria are not permitted under EU rules.
10. Twelve potential tenderers returned the pre-qualification questionnaire (PQQ) by the deadline of 7 October. SFPA decided that four did not merit further evaluation for a variety of reasons including technical capability, experience and capacity (despite earlier advice from SPD that experience could not be used as an evaluation criterion). The project team used a scoring system to evaluate PQQs and an invitation to tender (ITT) was issued on 14 October to five yards who scored more than 1,500 points.
11. Three bids were received by the closing date of 28 November from Appledore, based in Devon, Ferguson in Port Glasgow, and Peene-Werft, a German yard. Between December 2005 and January 2006, the SFPA sought clarification from all three bidders on aspects of their tenders.
12. The ITT included details of the SFPA's preferred propulsion system. In late January 2006, the provider of the propulsion system informed both the three bidders and the SFPA that it would be able to deliver the propulsion system earlier than originally anticipated. The SFPA then wrote to the three bidders asking for revised final bid prices to be received by 14 February which were based on its preferred propulsion system and the earlier delivery date.
13. The SFPA evaluated the tenders on 16 February using a weighted assessment which took into account technical proposals, delivery date and cost. Appledore was the cheapest and also scored well on technical proposals and delivery. The project team agreed that Appledore's was the most economically advantageous bid. The SFPA chief executive approved Appledore as the preferred bidder on 22 February.
14. On the same day, the Minister for Environment and Rural Development (the Minister) asked for clarification as to why the 'restricted' procedure was adopted, about the impact of the earlier availability of the propulsion system on bid costs and why the second bid process was required. On further reflection, the Minister asked for a report from the SFPA and the SPD setting out the reasons behind the decisions taken in the course of the tender process to that point and those which remained to be taken. Following discussions with the Office of the Solicitor of the Scottish Executive, Pinsent Masons, a legal firm with substantial experience in EU procurement law, and an independent procurement specialist were appointed to carry out a review of the procurement process.

#### **Independent review of the procurement process**

15. Pinsent Masons issued its draft report on 22 March which was finalised on 22 May. The report found a series of flaws in the procurement process which gave rise to concerns

regarding its compliance with EU procurement rules and the general principles underpinning them. These flaws included:

- The use of answers to certain questions in the PQQ to score and shortlist candidates invited to tender was contrary to EU procurement rules e.g. where the vessel was to be built, company health and safety policy and which elements of the contract were to be carried out in-house and which would be sub-contracted;
- The scoring system used to shortlist bidders should have been disclosed in advance and the 1,500 points cut-off mark should have been determined before the PQQs were opened and scored;
- There was a lack of clarity regarding the application of contract award criteria. The criteria used in both the OJEU notice and in evaluating the tenders following the final bid stage were technical proposals, delivery and cost. However, they were not consistent with the award criteria indicated in the ITT, which were technical proposals, build schedule, delivery arrangements and price. Pinsent Mason concluded on this point however that the original criteria of 'delivery' had been broadened in the ITT to cover both 'build schedule' and 'delivery arrangements' and that this re-working was not intended to favour any particular bidder;
- Tenderers were required to bid using SFPA named preferred manufacturers for certain types of machinery e.g. bow thrust motors. EU procurement rules prohibit technical specifications which refer to goods of a specific make or source that have the effect of favouring or eliminating particular goods or suppliers;
- In respect of clarification questions received during the tender period, the SFPA only responded to the yard asking the question rather than providing the answer to all bidders;
- The second and final bid stage, brought about by the preferred propulsion system supplier indicating it could deliver sooner than first expected, is not envisaged under the 'restricted' procedure. Under the 'restricted' procedure, allowing tenderers to make amendments to their bids which may impact on the evaluation of that bid after the final date for receiving tenders is prohibited.

16. The report recommended that the SFPA should halt the Minna-type procurement process and initiate a new procurement process having established a comprehensive procurement strategy. The report also recommended that the SFPA should draw up a report recording reasons for the cancellation and review all its procurement procedures. Ministers accepted the report's recommendations and the SFPA wrote to all tenderers on 25 May advising them of the decision to terminate the procurement exercise.

#### **Response to report recommendations and consequences of terminating the procurement exercise**

17. The SFPA has commenced a review of its procurement procedures in the light of the Pinsent Masons report and the wider McClelland Report on public procurement in Scotland, which was published in March 2006. Revised tendering instructions have been drafted and are to be finalised soon. Further discussions with the SPD will be required before any new procurement process is commenced.

18. The delay in procuring the Minna-type vessel will require an extension to the operating life of FPV Vigilant to enable monitoring and enforcement obligations to be met. As an older vessel, FPV Vigilant has slightly higher running costs, is less environmentally friendly and, in terms of enforcement, is less capable of keeping pace with a modernised fishing fleet. Ministers have yet to agree funding to allow FPV Vigilant to operate.
19. The SFPA's accounts contain a contingent liability to reflect that the termination of the procurement exercise may result in some future legal claims by unsuccessful tenderers. Based on Pinsent Mason's judgement, the SFPA considers that the risk of challenge is low given that the reasons for terminating the tender process were objectively based. It believes that the value of any claims would be limited to the costs of tender preparation only. As such, they would not materially affect the SFPA's financial statements.
20. The SFPA has also incurred costs of around £57,000 plus staff salaries as a result of cancelling the tender exercise. In addition, there is no guarantee that a future tender exercise will not result in bids which are more expensive than those received in respect of the cancelled exercise.
21. The cancellation of the Minna-type procurement exercise highlights the need to have an agreed procurement strategy which complies fully with EU procurement regulations. If there is any doubt, the SFPA should seek advice from procurement experts like the SPD and agree their role in advance. The appointed auditors are of the opinion that the SFPA treated all final tenderers equally but, due to process flaws, SFPA decided it had no option other than to terminate the procurement exercise. I expect the auditors to keep under review the Agency's proposals to amend their tendering instructions and to take a close interest in any further attempts to procure a Minna-type fishery protection vessel.



**Robert W Black**  
**Auditor General for Scotland**  
**28 November 2006**