



UK Government
Investments

**Initial review into UKGI's role in the competition,
award and challenge of the Magnox/RSRL
decommissioning contract**

Draft dated 25 October 2017

1. INTRODUCTION

(a) Purpose and Scope

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- (iii) to form an initial view on what UKGI could have done differently to give rise to a better outcome and what lessons can be learnt for future UKGI engagements (section 4). UKGI will revisit these preliminary views once the findings of external reviews have been published.

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4. LESSONS LEARNT

- 4.1 The section below provides a view of the further steps that UKGI could have taken in its role in the Magnox competition, consolidation and litigation and the lessons that can be learnt going forward. Sections (a) – (c) focus on specific lessons in relation to the competition, consolidation and litigation. Section (d) provides more general cross-cutting proposals for consideration that focus on more general oversight and governance issues. Many of these lessons benefit from hindsight and the actions proposed may not have been reasonably expected at the time. These are an initial view; the external reviews may reveal further lessons to be learnt and potential further actions.

(a) Lessons learnt from the competition

- 4.2 The High Court's concerns with the competition broadly fell into three categories:

- (i) the way in which the evaluation was undertaken;
- (ii) the workload of the evaluators; and
- (iii) the complexity of the valuation methodology.

(i) *Way in which evaluation was undertaken*

- 4.3 **Issue:** Evaluation of the bids was subject to assurance and challenge by Burges Salmon. It was also subjected to periodic NDA internal audit exercises. Evaluators were provided with specialist training to prepare them and many were experienced in procurement. None of this was sufficient to prevent the failings identified by the High Court.

Steps UKGI can take to mitigate / address the underlying failings which caused this issue going forward:

- **Ensure scope and limitation of external assurance is understood.** Clearly external assurance processes failed. At the time, there was no clear indication that supplementary external assurance beyond the NDA's internal audit review and Burges Salmon was necessary: the MPA, which considered the process for the competition, commented favourably on the process, preparation and audit of the bid evaluation process (see paragraph 2.21 above). In hindsight, given the (necessary or unnecessary) complexity of the exercise and the acknowledged high risk of challenge (especially given how close the final scores were) a more robust approach should have been taken by the governance bodies involved in the external assurance regime (particularly the NPB, the CPB and the NDA Board) in interrogating and ensuring follow-up of relevant assurance. **UKGI board representatives and UKGI stakeholders on programme boards should ensure that an asset's board has a thorough understanding of the scope and limits of external assurance.**

(ii) *Workload of the evaluators*

- 4.4 **Issue:** The High Court judgment highlighted that the evaluation process was under-resourced as the NDA staff who were conducting this complex and time-consuming work were doing so in addition to their normal duties. UKGI was unaware of the extent of the burden placed on the evaluation team – as the MPA PARs reports on this issue were, on the whole, favourable (see paragraph 2.15 above). We note that UKGI was not able to interact with or observe the evaluation process due to the "black box" arrangements.

Steps UKGI can take to mitigate / address the underlying failings which caused this issue going forward:

- **Consider workload at an early stage and ensure workplans are appropriate for the staff being assigned.** There could have been greater challenge by UKGI, through the CPB and its shareholder role on the capability and resilience of the evaluation team.
- **Ensure workload is a regular agenda item where a project is taking a substantial amount of time.**

(iii) *Complexity of the valuation and methodology*

4.5 **Issue:** This was a very large and technically complex procurement which addressed decommissioning across several sites. The competition had over 700 requirements against which each bid had to be evaluated.²⁶

Steps UKGI can take to mitigate / address the underlying failings which caused this issue going forward:

- **Consider if an asset/its board has sufficient resources and expertise at its disposal when conducting a highly complex procurement.** A more general lesson learnt is suggested in respect of an asset's board capability at 4.12 below.

(b) **Lessons learnt during consolidation**

4.6 **Issue:** The risk of material variation to the Contract during consolidation was not properly calibrated or monitored by the NDA. This may have been because the NDA's risk management processes were not sufficiently robust at the time of the competition.

- **Ensure assets have effective risk management processes.** UKGI should ensure that the audit and risk review functions of its assets are as robust as possible. UKGI could request that Government shareholder NEDs are members of the relevant asset's risk and assurance committees, and ensure that where Government NEDs/or UKGI members attend risk and assurance committees, senior resource is allocated to maximise the challenge opportunity.
- More general lessons are suggested in section (d) below to address both management of risk and, in particular, the flows of information to an asset's board.

4.7 **Issue:** The governance arrangements for consolidation were not clear. Both the CCB and the NDA Executive appear to have had an overlapping role in overseeing the consolidation process. The lack of clarity around which entity had responsibility for the governance of consolidation may have affected how risks were monitored and flagged to the NDA Board, the NDA ARAC and other stakeholders. Some general lessons are suggested in section (d) addressing some of these governance issues.

Steps UKGI can take to mitigate / address the underlying failings which caused this issue going forward:

- **Push for clear, delineated and comprehensive project governance.** As the CPB did not oversee consolidation, UKGI was more removed from the consolidation governance process. Where a major project such as the NDA competition benefits

²⁶ It is difficult, even now, for UKGI to judge whether the construction of the exercise was overly complex. If the tender had been less defined this would have made consolidation even more difficult thereafter. It is therefore premature to come to definitive conclusions on whether this is a lesson to be learnt ahead of the Inquiry.

from distinct project governance, UKGI should push for comprehensive and clear governance arrangements to be in place from the outset until the end of the project, which in this case should have covered the finalisation of the revised Contract and revised Final Business Case and the end of the consolidation phase.

(c) Lessons learnt during litigation

- 4.8 **Issue:** The NDA's handling of the legal challenge was not sufficiently scrutinised or challenged.

Steps UKGI can take to mitigate / address the underlying failings which caused this issue going forward:

- **Government should be made aware of and approve key steps in substantial litigation.** To ensure the appropriate level of challenge and oversight of any future large-scale litigation the NDA and other assets face in the future, UKGI should recommend that framework documents with assets require immediate notification of, and Government approval for, litigation above an identified threshold of "substantial" liability, set by reference to each asset's risk profile.
- **Establish what oversight will be provided by UKGI and the relevant Government department.** At the outset of any substantial litigation involving an asset, UKGI should agree with the relevant Government department, and its lawyers, how oversight of the litigation will be provided.
- **When, prior to contract award, there is a strong likelihood of a serious challenge, or a challenge to a procurement has already been mounted, the decision to award the contract should be fully tested.** The asset's board should consider obtaining a second, external, legal opinion as a means of fully gauging risks ahead of a recommendation to the Secretary of State to award the contract.
- **Where a substantial legal challenge is mounted against an asset, UKGI should assure itself of the asset's internal legal capability.** NDA's in-house legal team was not sufficiently experienced or staffed for the ES litigation. UKGI insisted on additional internal resource²⁷ after the judgment was rendered, but this should have been done earlier.
- **In substantial cases, challenging the board on an asset's choice of legal advisers is key.** In this instance, Burges Salmon was in place for two competitions and was also instructed to defend the ES litigation. There are clear risks and potential conflicts of interest in permitting the law firm that designed and assured the evaluation process to advise on how to respond to a legal challenge on the competition. UKGI should also encourage – consistent with best practice for FTSE 100 companies – all assets to regularly change external lawyers, to reduce the risk of "group think".
- **Where the stakes are high, source more than one external legal opinion.** UKGI should insist that the asset consider more than one external legal opinion to ensure that legal advice and identified risks are thoroughly tested. Further, it should ensure

²⁷The former General Counsel for Royal Mail took on a short term seven-month placement in December 2017 to assist the NDA.

that any opinions and their authors appear put before the asset's board so that the board is able to take strategic decisions with proper calibration of legal risk.²⁸

- **Legal strategy and mitigation of risk must be challenged.** Throughout, the NDA Executive Team portrayed the litigation as a “try-on” and entirely without merit. However, litigation is universally recognised to be uncertain, and even a small risk of a very significant set-back requires mitigation. UKGI should ensure a full discussion of the legal strategy to ensure risk mitigation has been fully considered.
- **Attending the hearing.** Going forward, where hearings of important cases take place, UKGI should attend the hearing to gauge risk for itself. If a hearing goes badly, there is an opportunity, ahead of judgment, to settle.

(d) General lessons learnt

- 4.9 UKGI frequently interacted with the NDA on the competition, consolidation and litigation at working and senior levels, both formally and informally, and in several different contexts, for example on the CPB and the NDA ARAC. This provided the opportunity for broad discussion and multi-layered challenge.
- 4.10 Despite these safeguards, risks in the competition process were not comprehensively identified (or potentially mitigated) in a timely manner. With hindsight, the NDA Executive and NDA Board underestimated problems, most clearly with respect to litigation and consolidation. As UKGI does not have embedded procurement/litigation/consolidation expertise, it was inevitable that, as regards project design, delivery and governance, UKGI would need to rely on the appropriate project assurances provided by specialist bodies such as the MPA and IUK and relevant external advisers. This did not prevent scrutiny and challenge from a general corporate governance perspective.
- 4.11 A central part of UKGI's governance role is to hold boards to account. UKGI needs to ensure that this is done comprehensively, but also needs to balance against excessive intrusiveness and, in doing so, should not seek to substitute itself for, or duplicate the role of, the board itself. One of the Public Accounts Committee's recent conclusions²⁹ on governance of ALBs is relevant in this regard: *“Departments’ existing oversight arrangements can introduce costs and bureaucracy, or duplicate existing governance arrangements in arm’s-length bodies. We heard examples of approaches that focus unduly on compliance and control, rather than improving the value contributed by arm’s-length bodies.”* UKGI should therefore provide appropriate checks and challenges, without undermining the accountability of the organisation.
- 4.12 The general recommendations below are made with this balance in mind:
- Several of the failings identified indicate that the NDA Board was not sufficiently robust in challenging the NDA Executive or that it was not fully informed of the relevant facts at the appropriate time. This is particularly so, given the importance of the role of the NDA Board in providing governance of large-scale, complex projects. **UKGI should ensure regular board reviews consider whether an asset's board has the complete set of skills and expertise required (e.g. legal and/or procurement or nuclear knowledge).** Where specific NED skills cannot be obtained, additional measures should be considered, including retained specialist

²⁸ UKGI consulted three QCs and one senior barrister in the context of the GIB judicial review, to ensure that the challenge was properly gauged and risks mitigated.

²⁹ Conclusion 3, *PAC: Departments’ oversight of arm’s-length bodies* (12 October 2016) (link: <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/488/488.pdf>)

advice to the board. **The board review process should also regularly consider the quality and completeness of the executive's communications with an asset's board, including the board papers.**

- Where large legal risks are involved, UKGI should **ensure that an asset's board has direct access to legal advice and to the in-house legal team. Legal advice should not be relayed to the board by the executive team, as it was in this case.** Misunderstanding/misconstruing legal advice was a material factor which explained why the NDA Board was slow to respond in both the litigation and the consolidation. Ensuring that an asset's board is provided with the opportunity to discuss and challenge legal risk directly with a General Counsel would mitigate this risk, as would ensuring that the General Counsel reports directly to the CEO.
- **Ensure UKGI's role is clearly defined and that Government stakeholders are not looking for assurance from UKGI on specialist areas beyond UKGI's competence.** When project governance structures (such as the CPB) which involve UKGI are established, UKGI must ensure its own role within that structure is clearly established and is consistent with its role of managing the shareholder function. This should not be at the expense of UKGI being flexible and dynamic in providing assistance, but there should be a proportionate approach to ensure UKGI's role and the expertise it brings (and does not bring) is understood by all.
- **Where internal or external reviews of an asset's governance processes or projects are undertaken,** UKGI must hold the asset to account so that any resulting recommendations are promptly followed up.
- **In holding the NDA Board to account, UKGI should utilise its own board and its in-house legal function on consideration of risks.** To assist and develop its role in holding an asset's boards to account, UKGI could make more use of the UKGI internal risk management process to encourage discussion and debate of the major identified and horizon risks being faced by the assets it manages, especially by drawing on the expertise of the UKGI board and UKGI in-house legal colleagues.
- **Use the Non-Executive Director appointed by Government as a means of obtaining better quality information.** The forthcoming appointment of a UKGI Director as an NDA NED is an opportunity for fuller feedback on board discussions (and the performance of the NDA Board members). To optimise this, specific guidance should be provided to NEDs to enable them to fully inform the shareholder in a way that remains consistent with their obligations to the NDA.

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