

Scottish Hospitals Inquiry

Royal Hospital for Children and Young People/ Department of Clinical Neurosciences

Closing Submission for Scottish Futures Trust

Comment on closing submission by Counsel to the Inquiry

1. Scottish Futures Trust (**SFT**) has considered the content of the Closing Submission made by Senior Counsel to the Inquiry and Junior Counsel to the Inquiry (**CTI**) dated 7 May 2024, regarding the oral evidence on the design of the ventilation systems, the decision-making and governance around the opening of the hospital, and whether the hospital provides a satisfactory environment for the delivery of safe and effective care.
2. SFT broadly adopts the contents of CTI's Closing Submission so far as it relates to the context of the project and the role and involvement of SFT in relation to the project (in particular CTI's Closing Submission paragraphs 191, 349 and 378), subject to the following submissions made on behalf of SFT, which the Chair is invited to take into account when making findings and framing recommendations in relation to this phase of the Inquiry.

Risk transfer

3. Paragraph 62 of CTI's Closing Submissions states:

“The substantial risk transfer to the private sector under a revenue funding model includes a large element of design risk, but this transfer may transpire to be more theoretical than real”.

SFT are of the view that this conclusion is difficult to reconcile with the evidence and conclusion reached in relation to the problems with the specification and clarity in the brief (as set out at paragraph 22 of CTI's Closing Submissions).

4. SFT notes the conclusion at paragraph 194 of CTI's Closing Submissions, which states:

“The NPD model seeks to place most design risk onto the private sector. That is an understandable aspiration given the private sector is financing the hospital. However, the effectiveness of the risk transfer relies on two factors: (1) the clarity of the brief; and (2) the solvency of the special purpose vehicle. The project highlights problems with both aspects.”

5. The problems encountered by the project in respect of both issues identified above, relate to the lack of clarity in the specification rather than the nature of the risk transfer

intended in the contract. In respect of part (1) of the above statement, as the Inquiry has concluded that the specification was unclear, SFT considers that there is no basis for the Inquiry to reach conclusions regarding risk transfer (whether theoretical or otherwise) to the contractor. In respect of part (2) of the above statement, had the specification been clear then (a) completing the works in accordance with the specification to achieve practical completion; and (b) the financial consequences of failing to do so; is a risk taken by the construction contractor, the SPV and ultimately its senior debt providers, should the SPV become insolvent.

The Suitability of the NPD Model

6. Paragraph 195 of CTI's submissions states that:

"Any changes to the Project agreement have implications for these associated agreements. Witnesses gave evidence of NHSL effectively having to negotiate with ISHL's contractor (Multiplex) despite there being no contract between the parties. Therefore, any changes are problematic and result in complicated negotiations to resolve the issues."

7. SFT agrees that there are additional parties under the NPD arrangement as compared with a traditionally funded design and build contract which adds complexity, but it submits that Clause 33 and Part 16 of the Schedule to the standard form Project Agreement comprise a workable change protocol. Under the circumstances of this project, that protocol was not used during the construction phase and the preceding circumstances make it difficult to draw wider conclusions from its application in the post-2019 rectification works. Accordingly, it is not possible to conclude whether, under other more normal circumstances of a change being required, it would have been effective or not.
8. SFT agrees that it is a consequence of the financing and life-cycle maintenance included in an NPD contract that:
- a. Any change required by the contracting authority during the construction phase which leads to a requirement to extend the construction contract duration (delay practical completion) will be more expensive than under traditionally funded design and build contract due to the additional rolled up interest and cost of finance incurred.
 - b. Any change required by the contracting authority during the operational phase of the contract will be more complex than under a traditionally funded contract as life cycle maintenance is included in the contract. There will be both life cycle cost and risk considerations associated with any change that would not be there at all under a traditionally funded approach. However, it might be

considered a benefit that an authority is required to consider up-front the whole life-cycle cost of any changes it proposes to implement.

9. The Inquiry may consider that these factors are relevant to the appropriateness of the NPD model for acute hospitals.
10. More broadly, the Inquiry may also wish to consider paragraph 5.1 of SFT's document titled "Revenue Financing Opportunities for Infrastructure Investment" (Bundle 3, vol.1, doc 25, p.1,082) which states:

"Scotland has a long and successful history in the delivery of PPP healthcare projects, including acute; community; mental health and ACADs, 31 in total."

11. There was an active and mature market for PPP healthcare in Scotland, including the £293m Forth Valley Royal Hospital PFI project and the NPD structure had been market tested in health via the Tayside Mental Health Development Project. In parallel with the development of the RHSC / DCN project, the £213m Dumfries and Galloway Royal Infirmary was being delivered as an NPD project and did not face similar issues.
12. In respect of the RHCYP / DCN project itself, SFT's view is as set out in Peter Reekie's witness statement dated 28 April 2022 at paras. 71 – 84 which states that the switch to the NPD programme was the only option available in terms of enabling the hospital to be built at that time.

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