

Dr Kevin Pelan
Committee Clerk
Committee for Social Development
Room 412
Parliament Buildings
Ballymiscaw
Belfast
BT4 3XX

2nd Floor
Lighthouse Building
1 Cromac Place
Gasworks Business Park
Ormeau Road
BELFAST
BT7 2JB

Telephone: 028 9082 9325
Facsimile: 028 9082 9324
EMail: susan.mccarty@dsdni.gov.uk

5 September 2014

Dear Kevin

SDC Inquiry – Phase 3 evidence sessions – 16 and 18 September 2014

I refer to your letters dated 4 July 2014 requesting Will Haire, Jim Wilkinson, Michael Sands and myself to attend Phase 3 Inquiry sessions on 16 and 18 September 2014. Billy Crawford previously advised on 7 July that I was not available.

I understand that Dave Wall spoke to you on 22 August and you have now agreed that the departmental officials will appear together on 18 September 2014.

Please find in advance of departmental officials attendance, a written briefing from Will Haire at Annex A and at Annex B a written briefing from Jim Wilkinson, Michael Sands and myself.

Yours sincerely



SUSAN MCCARTY

Responses from Will Haire to key events and decisions referred to in SDC letter dated 4 July 2014

1. NIHE Board's decision of 13 April 2011 to terminate the response maintenance contracts held by Red Sky Group:

The Department had been aware for some time about the issues relating to Red Sky and the investigations being carried out by ASM Horwath and the NIHE's Repairs Inspection Unit. I had been verbally informed, prior to the NIHE special Board meeting on 13 April 2011, that the Board that day were to consider the termination of the Red Sky response maintenance contracts.

Following the Board meeting on 13 April 2011, the then Chairman wrote to me that day enclosing a copy of a restructured Board paper which had been approved by the NIHE Board at the meeting. The Board paper sought the Board's agreement, on the basis that the NIHE considered it had lost all trust and confidence in the Red Sky Group, to issue a three month termination notice in respect of all the response contracts held by them. The Chairman in his letter advised me that the notice of termination in respect of the Red Sky contracts was effective from 12 noon on 14 April 2011 and that the contractor was being notified accordingly.

2. Request from the Chairman of the Oversight Group on 24 June 2011 that the NIHE should include a clause in the new response maintenance contracts regarding damages resulting from poor contractor performance:

I chaired the Oversight Implementation Group which was set up to ensure the recommendations in the 2010 Review of Governance in the Housing Executive and the Gateway (Health Check) Review were implemented. The remit of the Oversight Implementation Group was to:

- assess the realism of the implementation plan being put forward by the Housing Executive;*
- provide monthly examination of the implementation of the recommendations;*

- *consider in-depth the Housing Executive's developing thinking in relation to key strategic issues,*
- *confirm that the recommendations in relation to procurement and contract management were appropriately implemented; and*
- *provide broad strategic advice and guidance.*

At the meeting on 24 June 2011 the minutes, in relation to contract management issues note that the Group discussed in detail the issue of Key Performance Indicators (KPIs); how these work through and have a financial impact; financial penalties for breach of contract; and that I asked "for a draft letter to Stewart Cuddy to ensure the issues raised in relation to linking some elements of payment and /or abatement to service levels are taken forward urgently."

Whilst Stewart Cuddy, the then Acting Chief Executive had attended the meeting on 24 June, I subsequently wrote to him on 4 July 2011 to formalise this request and advised that "the Oversight Group believe that the Housing Executive must urgently explore whether it may be possible and more appropriate to link some elements of payment and/or abatement to service levels" I suggested that DFP may have similar scenarios as they had contracts which contained KPIs tied into a contract pain/gain and that it would be useful if he contacted DFP to discuss this further.

I received a reply from the Acting Chief Executive on 6 July 2011 in relation to the suggestion that where the contractor had delivered poor customer service NIHE should consider retaining a percentage of monies due to the contractors as damages and advised that this suggestion had been put to the Procurement and Contract Management Project Board and the NIHE Board and both parties felt that there was merit in the Project Team considering the proposal, though careful consideration had to be given as to how the contractors' poor performance could be interpreted as a loss to NIHE and that it would also be necessary to seek legal advice. He also advised that this could cause delay to the delivery of the project and that response maintenance contracts should not therefore commence on 1 December 2011 but be deferred until 1 February 2012.

Jim Wilkinson, Director of Housing, replied to this letter and advised that at the meeting on 24 June NIHE had not advised that this aspect would significantly delay the project and asked NIHE for a full and detailed explanation in relation to the delay. This was forwarded to the Department on 1 August and indicated that if Board approval was secured in November the contracts start date could be advanced to 9 January 2012.

The NIHE's response maintenance contracts now have:

- provision for Low Performance Damages (LPD) to be applied in line with the terms of the contract; and*
- in line with Procurement Guidance Note (PGN) 01/12 contractors not delivering on contract requirements may be issued with a Certificate of Unsatisfactory Performance and the contract may be terminated. The issue of a Certificate will result in their exclusion from all procurement competitions being undertaken by Centres of Procurement Expertise (CoPEs).*

These two significant developments in relation to new contracts had been identified as key failings in the previous contracts.

3. Your decision not to attend the meeting of 27 June 2011 at Parliament Buildings between representatives of Red Sky and members of the DUP including First Minister Peter Robinson, Robin Newton MLA and Sammy Douglas MLA:

I was aware that Minister McCausland had agreed to meet representatives of Red Sky and Peter Robinson MLA, Robin Newton MLA and Sammy Douglas MLA on 27 June 2011 as I was copied into the briefing prepared by departmental officials for the Minister in advance of the meeting.

I do not necessarily attend meetings, such as this, arranged with the Minister and it is difficult to remember such details with the passage of time. However, I note that my Personal Secretary was asked to put this in my diary on 23 June and was then advised on 24 June 2011 that I was no longer attending this meeting. My diary on 27 June 2011 records that I had another meeting scheduled at 4pm in Belfast City Centre. The Minister's meeting was at 5pm in Parliament Buildings and it would therefore have been

impractical for me to attend. However, I was aware of the briefing that had been provided for the Minister in advance of the meeting and that two senior departmental officials were to attend the meeting.

4. Meeting of 30 June 2011 with the Chairman and Chief Executive of the Housing Executive and senior DSD officials to discuss the termination of the Red Sky contract:

I was copied into a briefing prepared for the Minister in advance of the meeting on 30 June 2011 with the Chairman and Chief Executive of the Housing Executive. The Minister's diary records that this meeting was scheduled to be held from 16.30 – 17.30. I had another engagement in my diary that day and, as the minutes record, I joined the meeting in the latter part of discussions.

The note of the meeting records the discussion and that the Minister advised the meeting that he had asked the Department for a forensic examination to take place on the management of contracts and it would be inappropriate therefore to change contracts until this was completed, in the region of eight weeks. The Minister asked the Housing Executive to take this proposal to the Board and recommend his proposal on the basis that the Administrator could guarantee to conduct the work.

The note of the meeting at the end also records that I "advised that officials and the NIHE would face challenges but needed to look at the Minister's request in taking forward the investigation and the implications".

5. Your submission of 1 July 2011 advising the Minister not to issue a direction to the Housing Executive in respect of the termination of the Red Sky contract:

I forwarded a submission to Minister McCausland on 1 July in relation to a "Direction to the Northern Ireland Housing Executive to defer the termination of the Red Sky contract". In the submission I set out the background to the issues in relation to the termination of the Red Sky contracts by the Housing Executive, the potential use of a Direction and the consideration of this in relation to Government Accounting and Use of

Public funds; Contract, Procurement and Insolvency issues; Potential Legal Challenge; and other issues, for example, potential resignations from the NIHE Board.

As Accounting Officer I advised that the Minister's wishes, namely a forensic investigation and continuation of services to tenants, could be achieved more appropriately through the proposed assignment of the Red Sky contract to neighbouring contractors and recommended that a Direction should not be issued to the Housing Executive in relation to this matter.

The response from the Private Office issued to me on 6 July 2011 advised that; "The Special adviser has commented as follows: 'Minister's letter to NIHE may change the context of this paper? Minister's position is that due to his concerns re NIHE handling of and monitoring of maintenance contracts he wishes DSD to instigate forensic investigations of both NIHE and contractors and at the same time a procurement exercise which is open and transparent for the interim contract should be commenced"

6. Meeting of 1 July 2011 with senior DSD officials to discuss the letter to the NIHE advising of the forensic investigation into the adjacent contractors and the extension to the Red Sky contract:

This was a follow on meeting from the meeting on 30 June 2011. There were a number of meetings during this period and it is difficult with the passage of time to recall the specific discussions. However, Minister McCausland issued the letter to the NIHE Chairman on 1 July 2011 which advised that;

"I have asked officials to carry out a forensic investigation of a sample of Housing Executive contracts including those of the contractors to whom it is proposed to reassign the Red Sky contract on termination. Following our discussions and subject to the Administrator stating that he can continue I would now ask you to put to the Housing Executive Board that the termination date of the Red Sky contract should be extended from 14 July 2011 to allow an open procurement competition for the Red Sky contracts to be undertaken with immediate effect. This contract would be for a period of six months or until the new contract procedures can be put in place."

7. Your discussions with the Chairman of the Housing Executive on 5 July 2011 regarding the extension of the Red Sky contract:

Whilst there were a number of meetings and discussions around this time, my diary does not record a meeting with the Chairman on 5 July 2011. However, on 4 July 2011 I, along with Michael Sands, met with the Chairman at lunchtime to discuss the Minister's letter of 1 July and to ensure that the nature of the Minister's request, set out in his letter, was fully understood by both the NIHE and the Department.

8. NIHE Board meeting of 5 July 2011 regarding the Minister's request for an extension to the Red Sky contract:

I am aware that the NIHE Board met on 5 July 2011 to consider the Minister's request to extend the Red Sky contract and following the meeting the Chairman wrote to the Minister to advise of their deep concern at the stance he had taken and that the Board that morning has reconfirmed their view that the trust and the confidence necessary for the satisfactory operation of the contracts had been profoundly undermined. The Board had also instructed their legal representatives to take the necessary preparatory steps to present a challenge to the legality of any Article 10 direction and had directed that the adjacent contractors should continue to make preparations to assume the contractual obligations previously held by Red Sky until 14 July 2011.

9. Your submission to the Minister dated 6 July 2011 regarding NIHE's decision not to extend the Red Sky contract pending an open procurement competition and the possible discussion of this at the Executive Committee on 7 July 2011:

I submitted a briefing to the Minister on 6 July 2011 on the current position following the letter from the Chairman on 5 July 2011. I advised the Minister that the Board of the Housing Executive had met and responded to his request to extend the contract. Their response had highlighted a number of issues:-

- a) *The Board advised that they remained content that the action they had taken against Red Sky has been appropriate in light of the issues that investigations had revealed and that the steps taken to re-assign the contracts to adjacent contractors had been the most appropriate approach to both ensure continuation of services and offer exiting employees protection under TUPE;*
- b) *The Board had confirmed that adjacent contractors stood ready to take over the contracts from the termination date. These contractors had also indicated that they had already incurred significant expenditure in preparing for these contracts. The Board had suggested that they and the Department could face legal challenge as the contractors, in relation to their losses, sought redress for breach of their legitimate contractual expectations;*
- c) *Public confidence in the Board's ability to discharge its statutory function could be eroded in the absence of a coherent rationale for extending those contracts;*
- d) *Red Sky had not mounted any public or private law challenge to the Boards' decision to terminate their contract;*
- e) *The extension of the contract could secure a benefit for a particular contractor or purchaser; and*
- f) *The Board considered that this was a significant and controversial matter as defined in paragraph 2.3 of the Ministerial Code.*

The Board had therefore concluded it was not in a position to take forward the Minister's request in relation to extending the termination of the Red Sky contracts to allow an open competition for the contracts to be undertaken with immediate effect.

The NIHE also advised the Department that the Administrators were only able to provide a service up to 31 July 2011 and this would not meet the NIHE's specifications or those specified by the Minister.

I therefore recommended that the Minister should advise the Housing Executive to move forward with their proposals to re-assign contracts to adjacent contractors to ensure continued provision of services to tenants.

In the submission I also advised the Minister that this may be raised at the Executive Committee meeting on 7 July 2011.

Minister McCausland then wrote to the Chairman on 7 July 2011 confirming that the Housing Executive should proceed to the termination of the Red Sky contract on 14 July and move forward with the proposals to re-assign contracts to adjacent contractors to ensure continued provision of services to tenants. The Minister also issued a press release on 7 July 2011 which stated that he continued to have concerns about how maintenance contracts were managed and that he raised these concerns at the Executive meeting, and they were shared by Executive colleagues. He advised that the reassignment of the contracts due to expire on 14 July was not the ideal option but the only practical approach under current circumstances and he had written in these terms to the Chairman of the Housing Executive.

10. Your letter of 31 August 2011 in response to a letter from the Chairman of the Housing Executive dated 1 July 2011 regarding the termination of the Red Sky contract.

The then Chairman wrote to me on 1 July 2011 in relation to the notice of termination of the Red Sky contract. In his letter he set out the serious concerns of the Housing Executive Board and Senior Management Team in relation to the continuation of the Red Sky contract past the termination date of 14 July and asked that I step back and withdrew the Department's involvement and that of the Minister in this matter. I therefore responded to the Chairman as I was concerned about statements in his letter, particularly in relation to my role in this matter. (The Committee have had sight of the relevant papers, in particular my submissions to the Minister on 1 and 6 July 2011, and will be aware of the advice I provided to the Minister at that time.)

In my reply, I advised the Chairman that the standards expected of me in my role as Accounting Officer was at all times to act within the authority of the Minister to whom I was responsible and to support the Minister with clear, well reasoned, timely and impartial advice. It was, however, ultimately the Minister's decision to accept or reject that advice. I stated that I believed I acted appropriately in my role as Accounting Officer in relation to this matter, but that the substance of his letter called that into question along with my integrity. I asked that he should withdraw the remarks, particularly as his final sentence advised that if I did not do as requested he would seek legal advice on the matter.

The Chairman replied to my letter on 2 September 2011 advising that he was satisfied that the tone of the letter reflected the challenging circumstances which the Department and the NIHE faced in relation to the termination of the Red Sky contract. He assured me that in no way was there any direct or implied intention to impugn the propriety of my conduct as Accounting Officer or my personal integrity

Responses from Jim Wilkinson, Michael Sands and Susan McCarty to the additional key events and decisions in the SDC letter dated 4 July 2014, not included in Annex A responses.

- 1. Letter dated 17 May 2011 from Robin Newton MLA to the Minister requesting a meeting with Red Sky Representatives and Sammy Douglas MLA and the subsequent response dated 31 May 2011;**

Robin Newton MLA wrote to the Minister on 17 May 2011 requesting an urgent meeting, along with Sammy Douglas MLA and representatives of Red Sky, in order to make the Minister aware of their concerns in relation to the termination of the NIHE's contracts and the implications for the company and employees. In line with Private Office procedures, the letter was forwarded to departmental officials in Housing Division on 17 May to provide advice to Minister on the request and a draft reply.

Advice from officials was sent to the Minister on 27 May 2011 recommending that the Minister decline the invitation as this was an ongoing contractual matter between the NIHE and Red Sky. A draft reply to Mr Newton was attached which set out the position with Red Sky and advised that "I believe a meeting would not be beneficial at this particular time".

The Private Office advised Housing Division on 27 May that the Special Adviser had requested an amendment to the letter and that the last line should read "If you feel a meeting would still be beneficial, please contact ...". A Housing official spoke to the Private Office and asked that the protocol on requests for amendments by the Special Adviser should be checked and that this request for an amendment should be put to the Minister. Private Office advised on 1 June 2011 that the Minister agreed with the Special Adviser and the letter had been amended and issued. The Minister's reply to Robin Newton MLA issued on 31 May 2011 advising that if he thought a meeting would still be beneficial he should contact the Minister's diary secretary to arrange a suitable date and time.

2. Meeting of 2 June 2011 with the Minister's Special Adviser regarding the termination of the Red Sky contract;

The Special Adviser on 2 June 2011 requested an update in relation to Red Sky. NIHE were asked to provide an update and also to confirm who he could speak to in the NIHE about this. NIHE were further advised that the Special Adviser may wish to meet with the NIHE contact on 2 June or 3 June 2011. A memo from an official was then forwarded to the Special Adviser on 2 June providing the update and advising that the then Acting Chief Executive of NIHE would be happy to meet that afternoon to discuss this. Departmental officials are not aware if this meeting took place.

3. Meeting of 27 June 2011 at Parliament Buildings between representatives of Red Sky and members of the DUP including First Minister Peter Robinson, Robin Newton MLA and Sammy Douglas MLA;

Following on from Robin Newton MLA's request on 17 May 2011 for a meeting with the Minister, this was arranged to take place on 27 June 2011. In line with Private Office procedures, departmental officials were asked by the Private Office on 20 June 2011 to provide appropriate briefing and the names of any officials attending the meeting with the Minister.

The NIHE were advised of the proposed meeting on 20 June 2011 and were asked for an update on the NIHE's position in relation to their dealings with the Administrators. The Minister's Private Secretary also emailed a housing official on 21 June 2011 stating that the Special Adviser advised that a full briefing would be essential to include the current position of the Administrators. The NIHE were then advised on 23 June that the input from them would need to reflect the current position with the company and the proposed buyers.

NIHE provided input that day on the current position; meetings with the Administrators; legal proceedings; and requests to meet potential bidders for Red Sky. A housing official asked for some further information in relation to the potential bidders which the NIHE provided.

The briefing for the meeting was sent to the Minister on 24 June 2011. This also included a view from the Departmental Solicitors Office in relation to the meeting. Whilst the legal advice has not been provided to the Committee the Minister did advise the NI Assembly on 8 July 2013 of the following;

“Before the meeting took place, legal advice was sought from the departmental solicitors. I sought that advice in the light of the fact that I was being asked to meet individuals from a company in administration, and I wanted to be assured of the probity of my actions. It advised me that Ministers may meet such persons as they choose.”

The briefing also suggested that the Minister’s line to take should be:

“Issues regarding the termination of the contract with Red Sky by the Northern Ireland Housing Executive are contractual matters between the two parties concerned. An Administrator has been appointed to oversee the affairs of the company and their activities and role is governed by the laws of insolvency. These matters are subject to ongoing legal processes in which the Department has no role.”

The Committee has been provided with the note of the meeting which documents the discussions and records that the proper route for the consideration of contractual matters was between the NIHE and the administrators.

- 4. Letter of 1 July 2011 to the Chairman of the NIHE requesting the extension of the Red Sky contract. In particular, clarity is welcomed on the Minister’s decision to amend the officials’ initial draft of the letter to extend the termination date from a period of 8 weeks to 6 months.**

The Minister held a meeting on 30 June 2011 with the Chairman and Chief Executive of the Housing Executive. The note of the meeting records the discussion and that the Minister advised the meeting that he had asked the Department for a forensic

examination to take place on the management of contracts and it would be inappropriate therefore to change contracts until this was completed, in the region of eight weeks. The Minister asked the Housing Executive to take this proposal to the Board and recommend his proposal on the basis that the Administrator could guarantee to conduct the work.

Following on from the meeting, departmental officials prepared a draft letter from the Minister to the Chairman confirming that he had asked officials to carry out a forensic investigation of a sample of NIHE contracts and asking the Chairman to ask the Board to extend the termination date of the Red Sky contract for a period of eight weeks. The Private Office advised on 1 July that the Minister had amended the letter which issued on the 1 July 2011 and stated:

“I have asked officials to carry out a forensic investigation of a sample of Housing Executive contracts including those of the contractors to whom it is proposed to reassign the Red Sky contract on termination. Following our discussions and subject to the Administrator stating that he can continue I would now ask you to put to the Housing Executive Board that the termination date of the Red Sky contract should be extended from 14 July 2011 to allow an open procurement competition for the Red Sky contracts to be undertaken with immediate effect. This contract would be for a period of six months or until the new contract procedures can be put in place.”

Officials cannot recall with the passage of time why the eight week period was amended to six months, although with hindsight it might be assumed that this may have been to take account of the procurement period for new contracts.

5. Email of 5 July 2011 from Michael Sands to the Chairman of the NIHE regarding the Special Adviser’s request to amend the period of extension of the Red Sky contract from six months to four months.

Following on from the Minister’s letter to the Chairman on 1 July, the Housing Executive Board were meeting on 5 July 2011 to discuss the Minister’s request. The departmental official emailed the Chairman that morning, prior to the Board meeting, stating that the

Special Adviser believed that six months (as per the Minister's letter) was too long a timeframe for continuation of the contracts by the Red Sky Administrator. Advice had been sought from Central Procurement Directorate (CPD) which indicated that 91 days was required to complete a tender exercise once all the paper work had been prepared. Therefore allowing one month for the paperwork and three months for the tender exercise, four months was more appropriate. The Chairman was asked if the question could be put to the Administrator to ascertain if they would be able to continue with the response maintenance service for a minimum period of four months rather than the six months referred to in the Minister's letter.

- 6. Letter of 7 July 2011 to the Chairman of the NIHE confirming that the NIHE should proceed with the termination of the Red Sky contract on 14 July and reassign the work to adjacent contractors.**

The Permanent Secretary submitted a briefing to the Minister on 6 July 2011, following the letter from the Chairman to the Minister after the Board meeting on 5 July 2011. He recommended that the Minister should advise the Housing Executive to move forward with their proposals to re-assign contracts to adjacent contractors to ensure continued provision of services to tenants.

Following the Permanent Secretary's submission on 6 July, a further submission was prepared by officials on 7 July which recorded that the decision was the NIHE should move forward with their proposal to reassign the contracts to adjacent contractors. A draft reply was also attached for the Minister to consider to reply to the Chairman's letter on 5 July 2011. Minister McCausland then wrote to the Chairman on 7 July 2011 confirming that the Housing Executive should proceed to the termination of the Red Sky contract on 14 July and move forward with the proposals to re-assign contracts to adjacent contractors to ensure continued provision of services to tenants.

- 7. Submission dated 18 July 2011 regarding letter of response from the Permanent Secretary to a letter from the Chairman of the Housing Executive dated 1 July 2011 regarding the termination of the Red Sky contract.**

Refers to number 10 in Annex A