Dear Mr Cooke,

Public Accounts Committee Hearing
The Nuclear Decommissioning Authority: the Magnox contract. HC461 – 23 November 2017

I write in relation to your letter dated 28 November 2017. I would like to respond on three points:

1. Minor corrections to the transcript.
2. Proposed explanatory footnote for the transcript.
3. The provision of the legal advice received by NDA during the procurement, litigation, settlement, consolidation and termination phases.

On the first point my team has proposed a small number of corrections we think it would be helpful to make to the transcript, as follows:

- Q62 – the response from John Clarke makes reference to ‘notes’ and ‘note’. These should read ‘nodes’ and ‘node’ respectively. In the Magnox competition each topic for evaluation was termed as a ‘node’.
- Q62 – the response from Alex Chisholm and subsequent clarification from Layla Morgan make reference to ‘past failed thresholds’ in three instances. These should read ‘pass/fail thresholds’ in each case.
- Q74 – the third paragraph of the response from David Peattie states that “…the liability was rested with a US private equity firm…” . This should read ‘the liability was vested with a US private equity firm’.

Our Ref: CEO(17)-0117
Date: 15 December 2017
On the second point, regarding potential explanatory footnotes to the transcript, we feel that there were two exchanges during the hearing which require correction/clarification. These were questions 72 and 80.

- On question 72 we feel that Mr Clifton-Brown may have misinterpreted the timing and findings of the Supreme Court which lead to a potentially misleading exchange. We have set out an explanation below which you may wish to include as an explanatory footnote.

  The issue of whether damages were payable was taken all of the way to the Supreme Court and the Supreme Court held that (i) breaches of procurement legislation had to exceed a certain threshold in order for damages to be payable; and (ii) EnergySolutions was entitled to be awarded damages even though it had brought its claim outside of the standstill period. Importantly, the Supreme Court judgment was handed down after NDA had settled the case and had determined the level of compensation to be paid to EnergySolutions. Even if the Supreme Court ruling had been available at the time of the settlement the failure to bring a claim during the standstill period would not have resulted in a reduction in quantum because of the Supreme Court’s findings. The NDA’s argument in court was that a bidder has no right to damages once the standstill period had expired but the Supreme Court ruled that this was not the case.

- On question 80 Mr Clifton-Brown stated that “…you accepted that bid of £600 million and because it was a TGCI contract…”. We believe that Mr Clifton-Brown was referring to a Target Cost Incentivised Fee form of contract and therefore that ‘TGCI’ should read ‘TCIF’. We are unsure regarding the reference to a £600 million bid as the CFP bid for the Magnox contract was in the sum of £3.8 million and recommend that the source of this figure is checked with the National Audit Office as it is not a figure that we recognise. We would be happy to liaise with the National Audit Office about this.

In relation to the provision to the Committee of legal advice received by NDA throughout the various phases of the Magnox contract, I understand that my team are in discussion with you to seek a resolution which would be acceptable to yourself and the Committee. I understand that you will set an appropriate deadline to fulfil this action once an appropriate resolution is established.

Finally, I understand that John Clarke is writing to you separately to provide some clarifications to the evidence that he gave to the Committee.
My team will continue to work with you to conclude the Committee’s requirements. If you have any queries please feel free to contact me.

Yours sincerely,

David Peattie
Chief Executive Officer
Nuclear Decommissioning Authority

Copy:
John Clarke
Alex Chisholm
Mark Russell