

LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

Tuesday 15 March 2005

Session 2

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LOCAL GOVERNMENT AND TRANSPORT COMMITTEE 10th Meeting 2005, Session 2

CONVENER

*Bristow Muldoon (Livingston) (Lab)

DEPUTY CONVENER

Bruce Crawford (Mid Scotland and Fife) (SNP)

COMMITTEE MEMBERS

*Fergus Ewing (Inverness East, Nairn and Lochaber)
(SNP)
*Dr Sylvia Jackson (Stirling) (Lab)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael McMahon (Hamilton North and Bellshill) (Lab)
David Mundell (South of Scotland) (Con)
*Tommy Sheridan (Glasgow) (SSP)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Bill Butler (Glasgow Anniesland) (Lab)
Colin Fox (Lothians) (SSP)
Mr Bruce McFee (West of Scotland) (SNP)
*Mr Brian Monteith (Mid Scotland and Fife) (Con)
John Farquhar Munro (Ross, Skye and Inverness West)
(LD)

*attended

THE FOLLOWING ALSO ATTENDED:

George Lyon (Argyll and Bute) (LD)
Mr Jamie McGrigor (Highlands and Islands) (Con)
Mr Alasdair Morrison (Western Isles) (Lab)
Nikola Plunkett (Scottish Executive Finance and Central
Services Department)
Carol Sibbald (Scottish Executive Finance and Central

Services Department)
Allan Wilson (Deputy Minister for Enterprise and Lifelong
Learning)

THE FOLLOWING GAVE EVIDENCE:

Jim Barton (Scottish Executive Enterprise, Transport and
Lifelong Learning Department)
Joe Burns (Amey)
Jim Gilmour (Amey)
John Gooday (Scottish Executive Enterprise, Transport
and Lifelong Learning Department)
David Hart (Scottish Executive Enterprise, Transport and
Lifelong Learning Department)
John Howison (Scottish Executive Enterprise, Transport
and Lifelong Learning Department)
Jim Logie (Scottish Executive Legal and Parliamentary
Services)
Alan Mackenzie (BEAR Scotland Ltd)
Nicol Stephen (Minister for Transport)
Bill Taylor (BEAR Scotland Ltd)
Jim Valentine (Perth and Kinross Council and Society of
Chief Officers of Transportation in Scotland)
Tom Walker (Scottish Borders Council and Society of Chief
Officers of Transportation in Scotland)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Alastair Macfie

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Transport Committee

Tuesday 15 March 2005

[THE CONVENER *opened the meeting at 14:03*]

Item in Private

The Convener (Bristow Muldoon): Welcome to the 10th meeting in 2005 of the Local Government and Transport Committee. Some members have been delayed because another meeting has overrun. Brian Monteith, who will attend today's meeting as a substitute for David Mundell, is attending another committee meeting at the moment but will take part in later parts of our meeting.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I intimate the apologies of Bruce Crawford, who is unable to be here today.

The Convener: The first item on the agenda is consideration of whether we should take item 7 in private. The item concerns our approach to the Licensing (Scotland) Bill and a discussion of the witnesses whom we might consider it appropriate to call. Does the committee agree to take that item in private?

Members *indicated agreement.*

Tommy Sheridan (Glasgow) (SSP): I make my normal request for my dissent from that decision to be recorded.

The Convener: Okay.

Subordinate Legislation

Non-Domestic Rating (Valuation of Utilities) (Scotland) Revocation Order 2005 (Draft)

14:04

The Convener: I welcome to the committee Allan Wilson, the Deputy Minister for Enterprise and Lifelong Learning, who is here to talk about the draft Non-Domestic Rating (Valuation of Utilities) (Scotland) Revocation Order 2005, which has been laid under the affirmative procedure. As is our normal practice, we will give members the opportunity to question the minister and his officials after he has made some introductory remarks. After the question-and-answer session, we will have an open debate on the motion to approve the order. Only MSPs will be able to take part at that stage, which means that members will be unable to ask for clarification from officials at that point.

The Deputy Minister for Enterprise and Lifelong Learning (Allan Wilson): Prescribed assessment, by which I mean the practice of ministers setting rateable values or a formula for calculating rateable values for certain industries, was introduced in the post-war years, when conventional valuation became increasingly unreliable. That was because, for some industries, there were few comparable properties for which the assessors could turn for rental evidence and the newly nationalised industries did not, in general, operate with a view to profit.

The marketplace has changed substantially since prescription was introduced and most utility companies have been privatised or are now subject to competition. Telecommunications and canals were returned to conventional valuation in 1995, in the first phase of the Government's process of ending prescription for all industries that had been subject to that regime.

The intention was to return the remaining industries to conventional valuation at the 2000 revaluation, which took effect on 1 April that year. However, it did not prove possible to achieve that within the required timescale. As a result, at the most recent non-domestic revaluation, the Scottish ministers prescribed rateable values or formulas for calculating rateable values for the electricity and gas industries, Scottish Water, large docks and harbours and the railways, including the train operating companies—you will be familiar with that element, convener.

In November 2003, it was announced that the practice of having the Scottish ministers prescribe values or formulas for calculating rateable values

for those industries would end at the next non-domestic revaluation, which will take place on 1 April 2005. Ministers in England and Wales made similar announcements.

The ending of prescription means a continuation of the policy of harmonisation of rating practices north and south of the border and will mean that all ratepayers in Scotland will be treated in the same way, in that they will be valued by independent assessors and will have the right to appeal their valuation. Under prescription, there is no such right of appeal.

There has been consultation with more than 100 organisations on the proposal to revoke the various orders. No consultees made any comment on the proposal that is before the committee today. Other orders will come to the committee relating to the designated assessor regime.

With the ending of prescription and the advent of the designated assessor regime, it is necessary to revoke the existing orders. That is why I am appearing before the committee today. I am happy to answer any questions on the draft order.

Fergus Ewing: I have a couple of questions. I note that the majority of those who replied as part of the consultation process were in favour of ending prescription for all industries. However, four of the five respondents who expressed a view on the large docks and harbours industry were in favour of retaining prescription. That is in the notes to the statutory instrument, although I presume that those types of hereditaments are not affected by the order. Could the minister explain the position in relation to docks and harbours and say whether the majority view has been taken into account?

Allan Wilson: If you do not mind, convener, I shall ask Carol Sibbald to respond directly to that question. She is the official in charge of the consultation.

Carol Sibbald (Scottish Executive Finance and Central Services Department): The Executive note covered both the Non-Domestic Rating (Valuation of Utilities) (Scotland) Revocation Order 2005 and the Non-Domestic Rating (Valuation of Utilities) (Scotland) Order 2005, which deals with the designated assessor regime. In the consultation for the ending of prescription, we spoke to all the bodies that would be affected and we took everyone's views on board. Some of the docks and harbours did not comment on the ending of prescription, but some of them did. In reaching a final decision, ministers took account of the views expressed.

Fergus Ewing: Just to be clear, has prescription been ended for the rating of docks and harbours?

Carol Sibbald: Yes, it has, for all the industries.

Fergus Ewing: So they will now have their rateable values assessed by the assessor.

Carol Sibbald: Yes. That will be done by the assessor on a conventional basis.

Fergus Ewing: I have one other technical point, minister. You mentioned that the order is part of the process of increasing harmonisation, which I understand to be the technical term that denotes the adoption of identical practices in setting rateable values by the assessor north of the border and—I believe—by the Inland Revenue south of the border, although I may be out of date with that information. Which types of property or hereditaments are not harmonised now in Scotland?

Carol Sibbald: In general, rather than harmonising individual blocks of industries, we are talking about the harmonisation of the valuation methodology. The assessors, with the Valuation Office Agency, which is the equivalent down south, meet regularly to devise schemes of valuations for hereditaments in England and property in Scotland and they ensure that they come up with similar methods of valuing. It would be difficult to give a list of which types of property are or are not harmonised. The general practice is that the assessors harmonise the method that they use in valuing.

Allan Wilson: That is something on which we might want to come back to the committee with more detail. For the purposes of the order, however, the intent is that the methodology is harmonised in England, Wales and Scotland for those industries.

Fergus Ewing: Perhaps the minister could come back to us with a bit more detail. As long ago as 1995, as I recall, the then Secretary of State for Scotland opined that around 90 per cent of properties had their rateable values harmonised. Of course, if they are all harmonised, a higher business rate north of the border means that we have a higher rate of taxation north of the border.

Allan Wilson: I am familiar with the argument, but I am not the minister involved in that specific area so I would hesitate to commit my colleagues to anything in their absence. Nevertheless, I am sure that ministers will want to come back to the committee with the relevant information in respect of Mr Ewing's point, because that is obviously critical to the conduct of the independent review of such values that is currently under way.

Tommy Sheridan: I have two or three questions, the first of which relates to revenue generation. Is an assessment being made by the Executive in relation to an increase or decrease in revenue generation? I see from the notes that £500,000 was made available for the new

designated assessor regime to be established, but will authorities experience less revenue generation over the coming years because of appeals against valuation or is there an estimate of more revenue generation? Alternatively, is the policy revenue neutral?

Nikola Plunkett (Scottish Executive Finance and Central Services Department): We are currently in discussion with the assessors about the impact of the designated assessor regime, but at this time we do not have any figures on an assessed change.

Tommy Sheridan: I suppose that my worry is that we are dealing with vast tracts of land that were formerly under a prescriptive regime. Now that there is the right to appeal against assessment, I am quite confident that people will exercise that right and I am worried about the large fall in revenue that could result from that. Has that been part of the equation that the Executive has been considering?

Carol Sibbald: I shall explain the process. The overall money that goes to local authorities is made up of a mixture of non-domestic rate income and revenue support grant. The non-domestic rate income is not based on the non-domestic rate income gathered by the local authority; it is calculated by a formula on a per capita basis. For example, if a local authority no longer has income coming in from Scottish Water because that is now dealt with in Fife, its revenue support grant would increase so that the overall funding that goes to it is as set out in the finance order.

14:15

Tommy Sheridan: I am sure that Carol Sibbald will be aware that, as a Glasgow member, I am worried that Glasgow's contribution to the non-domestic rate pot is always much larger than what we receive back and that the order will worsen the equation for us. If you are suggesting to me that the change will be revenue neutral, that is fine, but I worry about the appeal mechanism that is now in place, which was not there before.

Allan Wilson: The change is intended to be revenue neutral. As I am not the minister directly in charge, I am not familiar with the statistics. However, I suspect that Tommy Sheridan would get a degree of reassurance on that point in relation to telecommunications and canals, for which prescription was repealed about 10 years ago. We will certainly give the committee the opportunity to come back on those points when we bring forward the designated assessor order, which would probably be the more appropriate time to deal with these issues.

The Convener: I have two questions. First, the order harmonises the process in Scotland with that

in England and Wales. Is there evidence from England and Wales that the change was revenue neutral, as you expect it to be here? Secondly, when will the designated assessor order be introduced? I note that this order comes into force on 1 April this year.

Carol Sibbald: Telecoms and canals came out of prescription throughout the country in 1995. The situation has been the same in Scotland and England since then. As I explained, in relation to the overall finance that goes to a local authority, the level of non-domestic rate income gathered in does not affect the money that the Executive gives.

The Convener: It might not affect the money that goes to the local authority, but it could affect the resources that are available to the Executive.

Carol Sibbald: The situation is complicated by the fact that we are dealing with not only the ending of prescription but a revaluation, which has had an impact on rateable values. I do not want to digress, but I should explain that, when the poundage rate is set, an allowance is made for loss on appeals. That happens at each revaluation. We have taken into account, as far as we can based on what has happened at previous revaluations, what the potential loss on appeals will be.

Tommy Sheridan: I have an additional question, the background to which is the number of complaints that I have received, particularly from Glasgow, about the erection of phone masts on Network Rail's land without any consultation with local authorities or individuals—Network Rail does not have to consult. Will the new designated assessor regime impose extra responsibilities on those whose land is now being valued? Will it open up the possibility for communities to be consulted before the land is used? If not, can we work in such a mechanism so that the landowning bodies are not a law unto themselves?

The Convener: Unless the minister can say otherwise, I think that that is probably a planning issue rather than a rating issue. I expect that the answer to that question is that the change will not make any difference to the planning regime.

Allan Wilson: It does not affect it.

The Convener: You probably need to address that issue on another occasion, Tommy.

Tommy Sheridan: I accept that, but when someone's land is being evaluated, it is necessary to assess the revenue-generating possibilities of that land. If the landowner can generate a lot of extra revenue by allowing the erection of phone masts willy-nilly, I want that to be considered in the valuation. If the minister is saying that that will not be considered, I ask him why not.

Allan Wilson: It would be for planners to determine land use in that regard; it would be a matter for the assessor.

The Convener: To some degree, Tommy, you are bringing together two different issues. One is the assessment of the land for rateable value and the other is planning consent. The second is a completely separate matter. I do not think that planning consent would be connected with the order that we are considering.

Tommy Sheridan: I accept that land use is a planning issue and I thank you for allowing me a wee bit of latitude. I am just asking that the fact that Network Rail is exempt from planning measures but can use its land to generate extra revenue be considered when the rateable value of Network Rail's land is determined.

The Convener: I am sure that the assessor would take into account any economic activity on the land.

Tommy Sheridan: I hope so.

The Convener: As there are no more questions and as no members have indicated that they want to speak in the formal debate, I ask the minister to move the motion.

Motion moved,

That the Non-Domestic Rating (Valuation of Utilities) (Scotland) Revocation Order 2005, (draft) be approved.—
[Allan Wilson.]

Motion agreed to.

The Convener: I thank the minister, Carol Sibbald and Nikola Plunkett.

Births, Deaths, Marriages and Divorces (Fees) (Scotland) Amendment Regulations 2005 (SSI 2005/100)

Non-Domestic Rating (Rural Areas and Rateable Value Limits) (Scotland) Order 2005 (SSI 2005/103)

Non-Domestic Rating (Former Agricultural Premises) (Scotland) Order 2005 (SSI 2005/104)

Valuation (Stud Farms) (Scotland) Order 2005 (SSI 2005/105)

Non-Domestic Rates (Levying) (Scotland) Regulations 2005 (SSI 2005/126)

Non-Domestic Rating (Valuation of Utilities) (Scotland) Order 2005 (SSI 2005/127)

The Convener: Under item 3, we will consider six items of subordinate legislation. The Subordinate Legislation Committee did not raise any points on the instruments and no motion to annul has been lodged. Given that members have no points to raise, are we agreed that there is nothing to report on the six instruments?

Members indicated agreement.

Trunk Road Maintenance Contracts

14:23

The Convener: Item 4 is an evidence-taking session on the trunk road maintenance contracts. The first group of witnesses is made up of representatives of the current contractors, Amey and BEAR Scotland. From Amey, we have Joe Burns, who is the service director for strategic highways in Scotland, and Jim Gilmour, who is the liaison manager. From BEAR Scotland, we have Alan Mackenzie, who is the chief executive, and Bill Taylor, who is the operations director.

Good afternoon, gentlemen, and welcome to the committee. You will be aware that the committee has decided to do some work on the reletting of the trunk roads contracts, partly because there was some disquiet about the way in which the issue was handled the last time round. We want to ensure that any lessons that should be learned from the previous tendering round are taken into account by the Scottish Executive before it retenders the contracts in the forthcoming year. We welcome the opportunity to hear from the organisations that have been operating the tenders for almost five years now. To start off, we will give each of you an opportunity to make some introductory remarks about the tendering process, after which we will move to questions and answers. If you have not agreed who is to go first, we will go in alphabetical order—I invite Joe Burns to make his introductory remarks for Amey.

Joe Burns (Amey): I always knew that being called Burns was a disadvantage. I thank the committee for giving me the opportunity to say something at the outset.

Our experience of the tendering process last time round was that it was rigorous—I base my remarks on our experience of tendering for similar activities with other highway authorities. The process was primarily based on an assessment of the quality of tenderers to get them on to a level playing field; after that, the assessment was essentially price based. Our one comment about our experience is that perhaps a better balance of quality and price can be achieved in the future. Considering quality in addition to price is important.

The contracts were complex and there was a very short mobilisation period. However, by and large, the Audit Scotland report endorsed the process as having brought value to the delivery of highway services in Scotland. The on-going evidence throughout the life of the contract, as indicated by the performance audit group report, is that the service has been delivered and that it

continues to get better. I am certainly not saying that we are perfect, as there is always room to learn, but the process seems to have identified good players—I would say that, as we are one of them. We have lived up to the statements that we made at the time of the tender and have begun to deliver a significant highway service in Scotland.

We have addressed concerns about employment and retaining people and we have increased employment. We have provided additional added-value services and extended beyond the initial specification wherever that has been necessary in order to move towards a best-value solution for the client and stakeholders, taking into account the local authorities and the police in delivering a safe, efficient and effective highway service in Scotland.

Alan Mackenzie (BEAR Scotland Ltd): As Joe Burns's surname begins with a "B", he has—unfortunately—anticipated me by saying many of the things that I was going to say. I agree with most of the views that he has outlined to the committee.

In the northern part of the country, we found the short mobilisation period challenging. My one hope for the future is that there will be a reasonable period in which to get a business together and to start dealing with such a big contract. I was pleased that, despite the short mobilisation period, the PAG report considered that we were as good in the first year as the previous incumbents were in the previous year and that we had provided a comparable service. That was encouraging.

I do not want to spend time repeating what Joe Burns has said, but I think that it might be worth while to give some background and to say what we do and how we are constructed. BEAR Scotland Ltd is owned by three shareholder companies, which are major players in the United Kingdom construction market. They are Jacobs Babbie, which is a consulting engineers company; Ennstone Thistle Ltd, which is a road surfacing and quarrying company; and Ringway, which is a highway maintenance provider to the public sector. We are based in Perth and, as members know, we look after the north-west and north-east contracts, which are the main focus of the company's activity. That means that we are a dedicated resource that gives a dedicated service to the trunk road network.

On scale, the network is 2,500km of carriageway. I have been reliably informed that that is enough road to stretch from Aberdeen to Moscow—one wonders why one would want to take such a road, but never mind. We have a local presence through 11 depots around the country. We are also supported by our local authority partners—by Aberdeen City Council and through

Tayside Contracts. In addition, we have strong commercial relationships with Argyll and Bute Council and Highland Council.

Although many people think of us simply as the contractor out there who digs holes, we actually have a full range of services. In addition to dealing with network management, we have operational delivery teams and a large consultancy business with professionals who design various schemes and deliver accident investigation, for example. At a higher level, professional support is available to us from our shareholders as and when we need it. We also have a finance and administration team. Our well-developed local supply chain ensures that local industry shares in the workload that is generated by the contracts, as do the local authorities, with which we have active relationships.

14:30

Our main asset is our people. Among our 330 staff who are spread throughout the north of Scotland, there is a wealth of experience and local knowledge. A point that is not always understood is that many of our employees previously worked for local authorities but transferred over to us under the Transfer of Undertakings (Protection of Employment) Regulations. We blended them into a team with individuals from private companies. That was a healthy thing to do and we have all learned a lot from it.

We have been independently recognised as providing a comparable service to the previous operators. Our annual reports have demonstrated a year-on-year improvement and we are happy with the performance that we are giving under the specification.

People tend to dwell on the negatives, so let me highlight some positives. Over several years, we have dealt effectively with major landslides in the north of Scotland, especially with those that happened at the same time last year on the A9, the A83 and the A85. That was a challenge to us, but we worked well and we were recognised by the media as having provided a quick and efficient service in reopening the roads quickly.

Our safety record for highway maintenance is considerably better than the national average. We target a 50 per cent year-on-year reduction in incidents arising from our activities on the network. We also carry out more than 1,500 safety audits each year to ensure that what we do is as safe as it can be.

In conjunction with the client, we have developed an asset and inventory management system to establish the network's asset base, so that we can know better how to deal with things as we go forward. We have also innovated through

schemes such as the two-plus-one scheme on the A9. Some people think that that is controversial but we believe that, in a maintenance environment, delivering a third lane will ease congestion and make it easier to maintain the road.

In summary, we recognise that the public want safe and uneventful journeys on the network. It is not always possible to ensure that every customer who comes into contact with us is satisfied with the outcome, but we believe that we provide an excellent service that not only meets our contractual requirements but has already been proven to provide value for money through the competitive process.

I am proud of our record and of our staff, who, day in, day out, deliver results that are independently verified as being in line with the requirements that are placed on us. My colleague and I will be pleased to answer any questions.

The Convener: The two reporters who were appointed by the committee will ask opening questions. I will then draw other members into the debate. We will hear first from Michael McMahon and then from Fergus Ewing.

Michael McMahon (Hamilton North and Bellshill) (Lab): I have a couple of questions, which are based both on information that I have picked up from talking to people and from the written evidence.

We received a joint submission from South Lanarkshire Council, Glasgow City Council and Renfrewshire Council, which were the three local authorities that were involved in a contract prior to the previous tendering process. I think that those were called the first-generation—or 1G—tenders. Their submission comments:

"As with the 2G Contracts the Scottish Executive has endeavoured to abdicate responsibility and to place risk firmly at the Tenderers door regardless of who best can manage it."

First, do you agree with that comment? Secondly, do you believe that that skews the tendering process in favour of companies such as yours? Is there a level playing field on which the local authorities that previously secured the contracts can compete with companies such as yours in an open tendering process?

Joe Burns: Let me first deal with whether risk is placed where it can best be managed. The answer to that can be seen in the results of the tendering process. When a private sector company or any other organisation tenders for work, it needs to assess the risks involved in delivering that work and it needs to price those risks accordingly. Where risk is not apportioned correctly in the structure of the contract, that will inevitably lead to higher prices. There has to be the opportunity for a

return; anything that threatens that leads to higher prices. On the balance of the evidence, risk was primarily structured within the contract in such a way that it attracted value and competition, so it was in the right place.

I cannot remember the second question, but the third was whether there was an opportunity for the public sector to compete against the private sector. The market is challenging. Evidence seems to suggest that, where a focused service is provided, such as on trunk roads and motorways—and increasingly even in local authority services—and those services are clearly definable, there is a strong advantage for the private sector in delivering them. I am not saying that the public sector is not efficient at delivery, but the complexity of public sector services sometimes prevents the focus on the precise service. One cannot deliver the totality as efficiently as one can deliver a specific service. Evidence supports that conclusion not just in Scotland, but throughout the rest of the United Kingdom, which has led on taking an outsourcing approach.

Michael McMahon: The second question was whether you thought that the process was skewed in favour of the private sector rather than the public sector. When the last contracts were being tendered there was genuine concern that the contract specifications were not rigorous enough, which allowed you to bid lower than the local authorities, which knew that certain aspects of the contracts would have to be fulfilled but were not specified in the contract. I am talking about bridge maintenance and other aspects of the work, which local authorities knew had to be done, so they bid on that basis, although the tender specifications did not require you to bid in respect of that work. Is that a fair assessment?

Joe Burns: It is difficult for me to say whether the process was skewed. We were allowed to tender, so we tendered.

Alan Mackenzie: I am in a reasonably good position to answer the question, because when the 2G contracts were being priced I was with a private company in Scotland working with the Clyde area local authorities and a private consultant to bid for the contracts. I led the tarmac element of the tender in the early days, but transferred to England in the middle of it, so I do not have to comment on the end result, thankfully. In my opinion, the local authority consortium dealt with the tender no differently from the way in which a private company would price and deal with it.

Any incumbent in tendering will know some things that others cannot possibly know until the process is under way. I doubt that it would be possible ever to write a tender document that covered all eventualities. In the main, the tender document was a specified contract that asked for

delivery of specifics to be priced accordingly, therefore the bulk of the price could be drawn from the specifics of the tender contract.

Michael McMahon: That is a helpful answer. You are now the incumbent, so is there anything in the specifications that was not there previously?

Alan Mackenzie: Yes—that will always be an element, but I do not think that it was a substantial element amounting to millions of pounds of risk. If you were to place the contract on the floor of this room, it would probably reach to not far below the ceiling. It is difficult to prescribe everything and local knowledge can be a help and a hindrance.

Fergus Ewing: Good afternoon, gentlemen, and thank you for coming before the committee. I sought the committee's agreement to hold this mini-inquiry today for the simple reason that, as the tender process has begun—I believe that the documents will be issued in April—we have the opportunity to examine closely the specification. My aim is that a higher level of specification will be required in the new 3G contract than has been required to date.

I wish to place on record my recognition of the good work that BEAR Scotland has done—the work that Alan Mackenzie has just outlined. I want to acknowledge in particular the work that BEAR Scotland undertook last August as a result of the landslip episode. I also want to mention the huge amount of heat that has been generated in the press on the issue, some of which may have been generated by MSPs, including myself. It is often the case that companies are blamed when in fact they are merely fulfilling the terms of a contract. The inquiry might bring home that point.

First, I will focus on the issue that generates most concern—certainly, it is the one on which I receive most letters from constituents—which is winter maintenance. There is particular concern about the issue in the Highlands, but I guess that it gives rise to concern throughout Scotland. I am less familiar with the position as regards Amey. Plainly, winter maintenance involves gritting roads and clearing snow. A strong case can be made that the new contracts should include a higher level of care, whether by increasing the frequency of gritting or by scheduling shorter routes for gritters and snowploughs. I am sure that that could be done in ways that I do not understand but that our witnesses understand. We have a chance to influence the Executive's thinking positively in order to meet some of the real public concern about road safety in the conditions that prevail in winter in Scotland.

I have an open question for the panel. Would you, in practice, welcome being asked to meet higher standards? If so, could you give some

detail about how the standard might be set and how it could operate in practice?

Alan Mackenzie: We are more than happy to price for any specification that the Scottish Executive gives us. I am sure that the Executive is considering at the moment the aspects of the specification that it wants to change, enhance or improve. The industry had discussions in the past on the 2G contracts.

I am sure that the minister has read the press releases and cuttings to which Mr Ewing referred, which I, too, have read. It is for ministers to make the judgment as to what they would like and to balance that against budget affordability. Ministers will also have to consider the resources that would be required to deliver an improved service, whatever that might be.

The Convener: I will let Fergus Ewing back in, but I want to come in at this point. Your being one of the companies that will bid for the 3G contracts puts you in a difficult position. Of course, you will price any specification that is set, but as Fergus Ewing said, many of his constituents believe that there are problems in the present contract. Have operational problems occurred because of the way in which the winter maintenance part of the contract is structured? If not, do you believe that the contract works well in terms of achieving the outcomes that the Executive wishes it to achieve?

Alan Mackenzie: We deliver a good service within the current specification. There have not been many instances when it was found that there had been a dramatic failure on the operator's side to deliver the service. As I said, many different issues are involved; I am sure that everyone will be considering them at the moment. We are pre-qualifying at the moment for the tender, so it is not appropriate for us to go into great detail or to give an opinion on the tender document. I would be a bit worried about doing so.

Fergus Ewing: Without asking you to express an opinion as to what might be desirable, perhaps you could suggest what might be possible in practice. I take it that it would easily be possible to increase the specification so that road users could be more confident that gritting and snowploughing operations were more frequent.

Alan Mackenzie: Yes, it would be possible to do that.

Fergus Ewing: If that happened, what would the implications be for your operation? Would that require you to get more drivers or staff?

Alan Mackenzie: It certainly would.

14:45

Fergus Ewing: Is that something that you have discussed with the Scottish Executive? I note from the tender documents that discussions took place in December.

Alan Mackenzie: Yes, I think those issues were raised. It goes back to a balancing exercise. To increase the specification would lead to a large resource being required, particularly with respect to experienced drivers, as was suggested. The service that could be delivered would need to be balanced with affordability and the required resource.

Fergus Ewing: I do not mean this to become a dialogue between Mr Mackenzie and me. Would Mr Burns like to comment?

Joe Burns: I endorse everything that my colleague has said. We need to bear in mind the addition with respect to the specification and the factor of affordability. It is difficult to correct or enhance the specification in such a way as to avoid ever having a problem or increased risk because of a weather condition, be that snow, wind or rain.

As far as extending service and value is concerned, there are many ways to achieve a safer environment in winter, in heavy rain or in high winds. Some of that is about education. There might be softer initiatives that could be taken within a specification, which would enable a service-enhanced result to be provided without significant cost implications. I am thinking of positive, proactive actions with the media, the Executive and Parliament to promote better driver attitudes to winter conditions by encouraging people, for example, to drive more safely, to appreciate the conditions and to drive within them. That sounds like a soft issue.

Can we prescribe the specification so that the roads could always be kept open in winter? The honest answer to that is almost certainly no, if we are to maintain affordability. If we want to extend the service that is provided, softer issues need to be considered and softer initiatives need to be arrived at through working collectively to promote change in drivers' attitudes.

Fergus Ewing: Do you have anything else in mind, other than better communication and information?

Joe Burns: As Mr Mackenzie said, it would be possible to up the specification through providing more gritters and more drivers. However, there is a cost implication in that, and a balance needs to be struck. It can be a difficult choice sometimes.

Fergus Ewing: Since you have taken over responsibility for trunk road maintenance, has there been any change in winter maintenance? Do

you carry out the same standard and level of maintenance through gritting and snowploughing as the local authorities did when they had the contracts?

Alan Mackenzie: My understanding is that the specification has not changed from 1G to 2G. Bill Taylor has worked in both areas, so he will perhaps be better able to answer that.

Bill Taylor (BEAR Scotland Ltd): I was involved as a general manager of one of the 1G contracts. The specification for winter provision is based on a code of practice that was introduced in 1993, which spans all the contract arrangements to date. In some senses, the code of practice is national. Change has related to the way in which operators decide to put their resources into the service, rather than to the service itself. Essentially, the specification is the same.

Fergus Ewing: Although Highland Council was not obliged to do so, it effected a higher level of maintenance than BEAR has done, because it chose to do more than the contract provided. Is that correct?

Bill Taylor: The vast majority of the service is precautionary treatment. The precautionary treatment will be exactly the same today as it was under the previous arrangements. If the local authority chose to deploy additional vehicles from its local road network at some stage, that may have created the difference to which Fergus Ewing referred. It could also be that in some rural areas the local authority had integrated routes where there may have appeared to be more vehicles on the route, but in fact the vehicles were on the route for shorter durations as they travelled on to the local authority network.

Fergus Ewing: We heard from Neil Greig of the Automobile Association on winter snow clearing. He has stated:

"Some doubts still remain that the shift to fewer depots and fewer but larger snow clearing machines may be leading to a reduction in service. The AA Trust would seek reassurance that these issues are being constantly reviewed and the flexibility is available in the contracts to address short term local problems."

What is your comment on the substance of his criticism?

Alan Mackenzie: As Bill Taylor mentioned, under the previous contracts the local authorities may well have had a plough that would come out of one village, travel that part of the trunk road network, turn off into another village and then come back on to the trunk road network and go up to the next turn-off. Therefore, from time to time people could see more gritters and ploughs on the road than were dealing with the trunk road. Our routes are total route lengths and we have dedicated resources to treat those route lengths.

We come back to the question that Mr Ewing asked earlier: we could enhance that service, but a cost would be attached and resources would be required.

Joe Burns: The equipment that we use is dedicated to the type of road network on which we deliver the service. The equipment is resourced in line with the experience that we have gained throughout the United Kingdom and internationally. We operate the largest gritter fleet in the UK in providing winter services. We have a huge amount of experience, so decisions on depot location, the length of the routes and the type of equipment are all based not only on considering for the first time a solution for Scotland but on the experience of operating elsewhere. We have very strict contractual requirements to meet and we rate the winter service as being hugely important for the functioning of the region and the country, and for the safety of road users. We are very confident that we provide the right equipment and the right resource to deliver the service.

Alan Mackenzie: I add that the winter is changing. The type of weather that we get in winter is changing year on year. I am sure that the Scottish Executive is considering that and is no doubt currently debating it. We are getting far fewer severe snow events, although we are getting more frequent snow events. We are also getting much wetter weather, which causes many problems. If we salt a route by way of precautionary treatment—as Bill Taylor mentioned—and then there are constant showers, it is necessary to go out and re-salt that road. The weather has changed dramatically in recent years. We have all learned from that; I am sure that the Scottish Executive has.

Fergus Ewing: As far as I have seen, the snow has not gone—not from the Highlands, anyway. I believe strongly that we should have a higher standard of service. That would be welcome for all road users, particularly those who have written to you and me about terrifying, death-risking experiences on Highland roads. I feel that we should take the opportunity to tighten up the tender, because that would meet the major concerns of the public. It might mean that fewer irate road users phone you up to express their concern.

Alan Mackenzie: We would be happy to provide a higher level of service, if that is what is felt to be appropriate.

Dr Sylvia Jackson (Stirling) (Lab): I say to BEAR, which is the organisation that I deal with mostly in the Stirling constituency, that it has been a learning experience. I have to say that there are some very good points—I do not want to dwell on all the negative points.

You mentioned the landslide at Glen Ogle, and we admired the way in which you dealt with that. Also, while you have had the contract we have managed to set up a number of local meetings with communities about road issues. Those meetings have, to be fair, worked well, so there are some positive points.

I turn to the "Public report on the third year of the trunk road operating companies 2003/2004". I will pick out a few of the issues that have been raised with me, as Fergus Ewing outlined issues that have arisen in the Highlands. The point that caught my attention first is in section 2.3 on page 5, on the performance of the operating companies on defects and repair. The report states:

"This performance of the OCs remains an area of concern. The Department and PAG will seek improvements from the OCs over the coming year."

I wonder where you are on that.

Alan Mackenzie: The number of category 1 defects is usually quite variable as we go through the year. For example, last winter and this winter a huge number of potholes have occurred on various routes. A pothole is usually just an individual hole that appears; the structure of the carriageway is generally sound, and we effect a temporary repair then permanent repair of the hole. On the Skye route—the A87—last year, and on the A83 and sections of the A82 this year, we found potholes that are manifestations of the fabric of the carriageway coming to the end of its natural life.

Many roads in the north-west have evolved and are not engineered roads, so some lack positive drainage and so on. To return to the winter conditions that I explained earlier, the rain and other moisture that gets into the carriageway, combined with freeze-thaw scenarios, breaks up the surface. It has been difficult for us to deal effectively with potholes, so we got extra funding from the client to treat the work as an aspect of structural maintenance, which involves solving the problems that are creating the potholes in the first place.

My point is that results and performance go up and down depending on weather conditions. In winter, we sometimes have an apparently low key-performance-indicator result. We do not always get things right, and I am sure that there are areas that we should have repaired but which we have not, but in many situations there is no quick fix. In those situations, we make the road safe and plan for wider activity to deal with the problem. Again, that is a question of balancing the budget and spending the money appropriately within the context of trunk road maintenance. Recently, the local authorities identified major underinvestment in, and deterioration of, the local roads network. I suppose that that would also be true of trunk

roads; there will always be areas on which we could spend more money if we had it. If more money were available, we would be happy to spend it and try to stop potholes occurring in the first place.

Dr Jackson: Would Amey give a similar answer?

Joe Burns: There are fewer evolved roads in the south than there are in the Highlands. However, the service is clearly important because it is critical to safety, which we take seriously. Category 1 defects are often caused by incidents on the network, such as damage to safety barriers caused by barrier strikes. Recently, we had 11 barrier strikes in a single day on the trunk road network in the south of the country. We strive to meet the demands, but there are problems from time to time because of the sheer volume of defects. Such defects are nothing to do with our appreciation of the condition of the network but are caused by third parties. We strive to eliminate category 1 defects and to make them safe as quickly as possible. As the PAG report points out, we are by and large providing a reasonable service; however, there is always room for improvement, and we are certainly not complacent about important matters such as category 1 defects and the safety of the highway network.

15:00

Dr Jackson: It might be a little quicker if I deal with my other points together. Have you developed any partnership working with local authorities with regard to precautionary salt-spreading rates and overall winter road maintenance? I dare say that the situation in the Highlands is similar to that in some parts around rural Stirling, in that although many non-trunk roads might be at the end of a trunk road they are still difficult to get to. Do you have partnership arrangements that would allow you to grit parts of the local road network that are not very accessible?

Two weeks ago, it took us two or three hours to travel from Stirling to Edinburgh. It did not appear that any salt had been put on the trunk roads at this end of the country and the tailback was incredible. The situation seemed to have caught you unawares. Will you explain what happened? Finally, constituents who travel from Stirling to Glasgow have brought to my notice the amount of litter on the road, especially in Cumbernauld. What improvements have been made in that respect?

Joe Burns: On your first question, I have to say that we try to work in partnership wherever we carry out work. Partnership is not a fundamental contractual mechanism in 2G contracts; that is a little unusual nowadays, given that the advantage

of partnership working is fairly well recognised. By partnership, I do not necessarily mean a nice cuddly relationship, although it is always more pleasant to work in such environments. I think that genuine partnership is based on a deep understanding of one another's needs and capabilities and on having means of measuring whether certain aims are being delivered. We seek to work in such partnerships.

In our flexible approach to the contract, we and the Scottish Executive have ironed out quite a number of interface areas. At the moment, I cannot think of one that addresses the specific example of non-trunk roads at the end of the network, but there are clearly a number of areas, including winter maintenance and other services, in which we will always have to iron out awkward little corners or arrangements. We seek to eliminate as many as possible of those awkward areas—I believe that the common parlance is “boundary issues”—although I acknowledge that some still exist. We certainly welcome the on-going development of partnership working to ensure that we eliminate such boundary issues in future 3G contracts.

As for Dr Jackson's experience of travelling from Stirling to Edinburgh, I assure you that we would have undertaken precautionary gritting on that road network. There is no road on which we have failed to provide such gritting or other proper treatment. However, we sometimes face very challenging weather conditions. For example, after gritting, the temperature gradient might improve, so the resulting heavy rain might wash the salt off the road before it has time to act. It might then snow again, which might freeze almost immediately, so we might not be able to get back out and treat the road network again. In many respects, it is a very imprecise science. Moreover, grit on the roads does not necessarily work immediately and incidents can occur before the heat that is generated by trafficking in the grit can take effect. I assure you that the roads would have been treated on time.

I will ask Jim Gilmour to answer your third question about litter, because he deals with that extensively in liaison with others.

Jim Gilmour (Amey): We liaise with all 19 local authorities: the subject of litter is very much to the fore. At times there is a lack of understanding about who is responsible for clearing what types of road. The dual carriageway section of the A80 that goes past Cumbernauld is the responsibility of the local authorities.

We work closely with local authorities to assist them with their operations. They examine our traffic management programmes daily so that they can access that traffic management, at no cost, to remove litter.

Amey is responsible for removing litter from motorways. Non-motorway trunk roads still sit with the local authority under the terms of the Environmental Protection Act 1990. There have been extensive discussions about litter clearance and sweeping within the meaning of that act, and about how future contracts might take cognisance of that and shift the responsibility to a single authority as appropriate and in agreement with the respective local authorities.

Dr Jackson: That is useful; thank you.

Alan Mackenzie: I will start with the easy question. BEAR is not responsible for litter. The only route for which we are responsible in that way is the M90. Local authorities are responsible for litter on the other roads.

I would love to partner on gritting routes and we actively engage with local authorities to talk about those issues. I hope that we will continue to do that until the tendering process for the next contract if we are successful enough to be selected for that tender list. Part of the problem is that local authority and trunk road specifications differ. The latter are 24/7, 365 day-a-year specifications. That means that we plan to respond to professional weather forecasts whatever the time. If the forecast says that it is going to be icy at 4 o'clock in the morning, we grit at a sensible time prior to that. That might be why people do not see a lot of our gritters out and about. It is not just a gimmick: much of the time they are out in the middle of the night or very early in the morning.

Local authorities have different winter maintenance arrangements. I cannot comment on them because I do not know what they all are, but they generally provide a daytime service that goes into the early evening and they do not go out to deal with problems at night unless there is an emergency or some sort of snow event. That is my understanding of the situation; I could be wrong. It would therefore be quite difficult to partner with local authorities when we are working with two different specifications.

On the day to which Dr Jackson referred, I left the hotel at Glasgow airport to go to Edinburgh to fly abroad. It took me four and a half hours and I missed my flight, although I got a later one. To defend Amey, there was nothing wrong with what it had done on the M8. The road was gridlocked, but it had obviously been ploughed and gritted. The problem was the result of the volume of traffic and the heavy snow that came afterwards. I turned off the motorway and went on to local roads. The situation was the same there, so I went back on to the motorway. I do not think that anything more could have been done on that day.

We understand the technical elements of such situations. Sometimes the public see gridlock and think it must be someone's fault because they are not doing something properly, but it is caused by people driving very slowly because they are concerned when the heavy snow comes along. Perhaps the right thing to do is get off the road and stop so that the services can get through to deal with the problem more efficiently.

Dr Jackson: Thank you. I thought that the gritters had not been out when I saw the ice but I understand that you would have seen the situation in a slightly different and more knowledgeable way.

The Convener: You should have got the train on that day, as I did.

Dr Jackson: I would have done if I was not in the wheelchair.

Margaret Smith (Edinburgh West) (LD): I want to pick up on one specific area of the PAG report for 2003-04. In the report, the largest area of concern about both of your performances is in the application of some of the management systems. I want to go a bit further than Sylvia Jackson did into the issue of defects and to talk about your routine maintenance management system.

Amey seems to have had some difficulties with that. What improvements are being made to your management systems? Have you had any discussions with PAG and the Executive about how they might be better addressed in the new tendering processes, with a view to improvement? If that means more money having to be found for the contracts, or whatever, have you made the Executive aware of that?

Joe Burns: Yes, indeed. The management systems that are defined in the 2G contracts are some of the most sophisticated of their type. They are bespoke to the 2G contracts and, as with any information technology system, although their development seems easy on paper, delivery is quite difficult. Nonetheless, records have been kept throughout. Although the PAG report states that we have had problems with our management systems—problems getting the IT system up to full speed and working—the paper-based management system that we have used in the absence of the IT system has been in place throughout. Records do exist, although we recognise that that is not the way it is meant to be and that it is more difficult to access paper-based records than those that are kept in an IT system.

We have worked extensively with the Executive and the suppliers of the software to eliminate the problems and to produce a more efficient system. Some of our discussions have led to questions about whether, in future, the Executive should provide the system to the operating companies

instead of the operating companies' developing it themselves. Those discussions have not reached a conclusion, but we have talked through the issues and that is one method by which a more robust system could perhaps be provided for any future operating company. We talked earlier about the need for a level playing field for competition. I suspect that, in the light of our experience, that may be one of the better ways to create a level playing field in the future.

Alan Mackenzie: I am not aware of any significant problems with our management systems being highlighted in the report. If you could show me where they appear, I would be able to answer your question.

Margaret Smith: I am referring to a passage in chapter 1, in which the report states:

"The largest area of concern on BEAR and Amey's performance was in the application of some of their management systems."

I picked up on routine maintenance because it is quite an important issue. Amey seems to have been open to more complaints and concerns about that and your performance appears to have improved more than Amey's since the beginning of the process.

I am trying to get to the bottom of whether there is a better way to use management systems. Mr Burns has alluded to the possibility of the Executive putting a system in place for anybody who tenders. That is the kind of thing that I am looking for. I would like to know whether, in discussions with the Executive and PAG about such things, potential improvements have been suggested that might be put in place for future tendering. The Auditor General for Scotland highlighted the complexity and the number of different assessments that have to go into the system. Have those things played a part in the problems with your management systems?

15:15

Alan Mackenzie: The contract is a quality contract and the whole fabric of it is about a quality response. We issue about 15,000 works instructions every year, which involve anything from clearing a gully to repairing a £500,000 area of carriageway. A huge amount of information enters our systems and I share the frustration that Joe Burns sometimes feels towards them. Any problems that we have had have been with the IT element, and we have had to get specialists in. Often, however, they find a gremlin and fix it only to find another gremlin in another part of the contract. I am glad to say that our systems are functioning pretty well at the moment, although the criticism could be made that, on occasions, we do not have the information on time. I accept that.

There will inevitably be some criticism with a contract of this size. I am sure that, as Joe Burns has said, the Executive is considering how it could best use the systems in future contracts. We will have to wait to see what happens in the next tender process.

Paul Martin (Glasgow Springburn) (Lab): Why should the taxpayer continue to pay for improvements in services? Many organisations throughout the world have improved service delivery without asking the taxpayer to subsidise that. Surely improvements can be made in a number of areas within the contract without the need for further public subsidy.

Joe Burns: I am confused. In what respect is the public subsidising the contract?

Paul Martin: Earlier, you said that if we wanted to see any improvements to the specifications of the existing contract, there would be an additional cost. Why should the taxpayer continue to pay? Both companies involved are returning profits on the contract.

Joe Burns: We do not provide the service under a subsidised contract. At the outset of the contracts, which were very much assessed on price, we tendered in an open market at a lower price than the other tenderers. For both contracts, that was the case. Initial value was delivered on day one; Audit Scotland has recognised the on-going value improvements; and the PAG report has recognised not only that we deliver financial value, but that the service has, by and large, been delivered.

The PAG reports throughout the contracts have shown that the service has improved from year to year. One notable improvement in service and quality has been made in south-west Scotland, where there has been a 39 per cent reduction in road accidents during the life of the contracts. That improvement of 39 per cent in the first three years has been achieved against the backdrop of a target of a 33 per cent improvement over 10 years. That has not been achieved alone; it has been achieved in partnership with others. I accept that. Nonetheless, the contracts are delivering value.

Within the contracts, there is a mechanism to allow further innovation to be delivered, but only where that innovation offers a further discount or saving. In the future, we would like not public subsidy but the possibility of introducing innovation into the contracts, with further services provided, where there could be more service for the same money, a greatly enhanced service for slightly more money or a significant saving for a slightly lesser service. A real consideration of value to balance the needs of users and the Executive with—

Paul Martin: It would be helpful to clarify a point. When I say “subsidy”, I mean that you receive your income for the contract from the Scottish Executive.

Joe Burns: Indeed.

Paul Martin: So you require public funds.

The point that I raised earlier was that you require additional public funds to improve your service delivery. The important point is: why should we fund improvements in a specification that you should be able to deliver anyway? One of the specific points that has been raised in the evidence that we have received is that, for example, there is a 28-day specification for street lighting. Local authorities deliver that in seven working days. The point that you made earlier is that for you to deliver those kinds of specifications we would have to improve the financing of the contract. I use that as an example and I know that there are other examples. You have said, “If you want me to improve service delivery, it will cost money.” I am saying that it cannot always cost money. There must be some improvements that can be delivered without the need to come back to the taxpayer.

Joe Burns: You are absolutely right. The specific question that we answered earlier from Mr Ewing was about the provision of significant additional winter maintenance services. There is no doubt that a cost would be attached to providing a larger gritter fleet to go out and grit more. That is clear cut. However, many services are provided within the contracts.

I am sure that Alan Mackenzie will speak on behalf of BEAR, but I will give examples from our company. We have 152 liaison meetings with local authorities each year. We have introduced an operational control room to provide real-time management of activities on the highway network and to provide a contact point for the public and for the national driver information and control system to improve the service that is provided. We probably now have double the number of staff that we tendered to have. Those services have been provided without seeking public subsidy: they are being provided to give a better service. Much is going on, although more could happen if we had a more flexible and genuine approach to best value.

Paul Martin: Can I clarify that you will require further funds to deliver certain elements of the contract? I appreciate that there may be some significant projects that would require further public—taxpayers’—investment, but there will be elements within the contract where you will be able to improve the specification, for example on street lighting, without there being a cost to the taxpayer.

Joe Burns: That could well be so. Each case must be considered on its merits.

Paul Martin: The point that we can make to civil servants is that instead of every single element of improvement of the specification having to be paid for by the taxpayer, the company can assume some of that cost.

Joe Burns: Our company has done that. We are judged by the service we provide, so we need to become ever more competitive and ever more efficient in the services we provide. Wherever possible, those efficiencies and that value will be to the benefit of our existing clients, but there will be some cases—each case is considered on its merits—where there might be a cost. It might be a small cost or it might be a large cost, but a decision will be taken in the interest of the service and with value in mind. That is one of the reasons we like working in partnership, so that we can understand all the nuances of that fine balance.

A bit of flexibility is required to get the best value solution. Take street lighting as a hypothetical example. If a seven-day service is required, it might cost £100, but if an eight-day service is required it might be free. One needs to consider those nuances and have a degree of flexibility to get the best service possible at the lowest possible cost to the taxpayer.

Alan Mackenzie: We need to have the ability within the contract to do that. We need to have the ability to offer innovation and to offer ideas that would save money.

We obviously gave you the wrong impression that we are always looking for more money. We are always looking for ways to innovate and to help deliver the contract. That might involve delivering a physical service on the ground in a different way, thereby doing it more effectively and perhaps more economically.

I have said that the contract is about quality. Our company has been recognised in the PAG report for providing a very good quality of service within the contract year on year. We have introduced the Q-Pulse system, which is a computerised quality system. It applies to all our activities—all the specifications and procedures are in there, as are our quality results. It is not a contractual requirement, but we have put that system in place because it makes us more efficient. We have given access to the Scottish Executive and the performance audit group, which have free, open access to that—

Paul Martin: I would like to clarify one point. What if you were to approach Scottish Executive officials under the current contract and put it to them that you could deliver a service within seven days at no cost, through an innovation that you had made? You have mentioned one example, but

there will be other innovative processes that you could follow. Are you saying that you could not deliver that innovation because of the way the current contract is set out?

Alan Mackenzie: I am quite sure that the Scottish Executive would deliver the first one you mentioned if it was along the lines of, “We will give you a service for nothing.” There is a facility in the contract for innovation, but the driver is to save cost. Sometimes, innovation might cost a little bit more but deliver far more. Joe Burns’s point was that it might be worth having a slight change to that facility under the next contract.

We speak to the client all the time. It is not as if nothing has changed with the contract. We have done a lot of things with the client. We have worked together and delivered a range of improvements on which we have agreed collectively, and they have benefited the contract. I mentioned the Q-Pulse system. We now collect far more information when we are going around the network inspecting the asset than the contract asks us to. We have put that information into the system to allow the client to see more detailed information about what is happening to the asset and about what deterioration has been taking place.

The contract asks us to deliver a one-year and a three-year programme. Over the past few years we have in fact been delivering and looking at a five-year programme. That is not a requirement of the contract, but it makes us more effective and it gives the client more information, which I think is healthy.

Tommy Sheridan: The PAG report has been referred to already. The incidence of default notices was quite high in your first year of operation, fell in the second year and has since gone back up again. Can you assure us that you are taking every necessary measure to curtail both the level of default notices and the new notification of emerging issues? There are still overhangs from year to year.

Alan Mackenzie: BEAR had a large number of default notices in the first year. I am pleased to say that that number fell dramatically in year 2. We have had year-on-year improvement: in each year of the contract, we have had fewer default notices than the previous year.

Tommy Sheridan: Referring to the report that is before us, it was only a small increase, but the number rose from four to five for—

Alan Mackenzie: I beg your pardon: I was adding the figures for both networks to arrive at a combined total. My apologies.

Tommy Sheridan: I am talking about your individual package of contracts.

Alan Mackenzie: That number rose, but we should consider the four or five default notices in a year in the context of the thousands and thousands of requirements under the contract. "Default notice" sounds like a really big issue, and it is an important issue which we need to improve on, but in the context of the scale of the contract, I think that that level is acceptable, and we are improving as a company year on year overall.

Tommy Sheridan: Before you leave this subject, I would point out that the number of outstanding end-of-year default notices is still relatively high. There were 18 in 2002-03 and 20 in 2003-04. The default notices are being recorded. Some are being dealt with, but some are not. That is what I am getting at.

Bill Taylor: In the north-east and the north-west, we have one historical default notice open on each contract. One of those notices is part of a long-term monitoring programme for a piece of road. There are two relatively new default notices open on one of the contracts. The situation is that there are three default notices open on one of the contracts and one open on another.

Tommy Sheridan: Are you happy with the structure that you have in place to deal with that?

Bill Taylor: That has moved on as well. You are talking not just about new default notices, but about default notices being closed out and outstanding issues being addressed. There has been a great improvement in that.

Alan Mackenzie: There are still two weeks to go in this financial year.

15:30

Tommy Sheridan: I am afraid that Amey's performance is not as good.

Joe Burns: Currently, we have one default notice outstanding, but that has been recommended for sign-off when the relevant official returns from leave in a week's time.

Default notices are a mechanism within the contract that can sometimes mask the issue. Some are issued for highly significant reasons, others may be issued to deal with more administrative matters. For example, we received a default notice because some minutes were late. Although that is important, there was no differentiation.

The Executive and PAG have worked with us to make a significant improvement through the notice of emerging issues process, whereby early notification of an issue allows us to address it more proactively by ensuring that the necessary action is taken immediately and that we do not wait for a failure and then try to correct it. It is clear

that such a relationship is much more positive for us all.

I reinforce Alan Mackenzie's point. The contract contains about 17,000 shall-dos and is 2,500 pages long. We have had 48 default notices over the duration of the contracts, which means that for every 355 shall-dos that we do, there is one that we do not do. That means that in about 0.3 per cent of cases we are not quite as good as we would want to be. I am in no way trying to minimise the importance of the issue. We take all failures very seriously, but the context in which default notices need to be considered is that, in delivering a hugely complex contract across a vast geographical arena, we use some of the most sophisticated systems in the world for managing highway contracts.

Tommy Sheridan: I take on board the points that you make. I drew attention to the issue because the trend was definitely downwards, but in the past year it has started to go up again.

You talked about doubling the number of staff; I do not know whether the position is the same for BEAR. When you say that you have doubled the number of staff, do you mean that Amey now employs twice as many staff as it employed on day 1 of the contract, or do you mean that it employs twice as many people as the local authorities used to employ to do the job that you are doing?

Joe Burns: The fact that there were already skilled teams in Scotland provided an opportunity for those teams to be developed both to enhance the services that are provided within Scotland and to create employment by selling those services elsewhere in the United Kingdom while continuing to base them in Scotland. Those are the two factors that have been combined. We recognised the benefits of providing enhanced services. I mentioned the operational control room and the provision of two or three people who work 24/7 to manage or control activities on the network.

Given the extent of the work that Jim Gilmour does, he might be able to enlarge on the liaison activities that we do. We go out and meet and hold discussions not just with local authorities as stakeholders, but with the police and organisations such as Keep Scotland Beautiful, in an effort to get to grips with all the important aspects of what are additional services—in other words, things that were not thought about as part of the specification. The provision of the winter maintenance service defined the number of people we needed. That has not changed.

Tommy Sheridan: How many staff do you have at the moment? You spoke about doubling the number of staff. How many staff were there before and how many are there now?

Joe Burns: I think that the figure for staff has doubled from about 150 at the outset to about 300 at present. The figure for staff and operatives is much bigger. That said, the number of operatives is defined by the work that we do and has remained the same since the outset. What has changed is the need for added-value services and the other things that make the contracts happen. The interface issues are fairly well documented, including the boundary issues with local authorities. Dealing with those issues and making things better take additional resource and time.

We are building up portfolios of schemes so that we are able to meet fluctuating budget demands and yet maintain a steady state of progress so that there is always work to be done that has to go into the system. In a sense, all of that work is done in recognition of the needs of the service rather than in answer to specific contract requirements.

Alan Mackenzie: The situation is similar for us. I ask Bill Taylor to go into the detail.

Bill Taylor: We expected a huge number of people to transfer when the contracts were let. The indication was that 700 or so staff who spent more than 40 per cent of their time on the contracts would transfer, but in reality only about 140 staff did so. In the early days of the contract, our overall staff number was around 200 and it has grown to more than 330. Within that figure, we have grown a civil engineering consultancy that is more than 60 strong, which is quite significant in Scottish terms. Previously, our shareholders provided that service remotely because the transferees who were needed to provide it did not transfer. There has been strong growth not only in that area but in other areas of the business, including street lighting. Within those distinct areas, we offer further specialisms, such as accident investigation and prevention, for which we probably have the largest team in the north of Scotland, with about 12 specialist engineers. Because they are able to look at the area in isolation, they can also provide expertise to areas that are outwith the strict confines of the contract.

Alan Mackenzie: I will add one point of clarification, if I may. The numbers come from the Audit Scotland report. The 700 staff were identified as people who

“spent more than 40% of their time on trunk road management and maintenance”

on the previous contracts.

Although I was not with BEAR Scotland at the start of the contract, I believe that Audit Scotland asked how many staff intended to transfer. In the northern contracts, the number given was 262, but the number of staff who actually transferred—each staff member had the right to decide whether they wanted to transfer—was 154.

Tommy Sheridan: Of those 154 transferees, how much protection was given to their pension rights? Do you have a comparable pension scheme to the one that the workers had previously? The question is for both BEAR Scotland and Amey.

Alan Mackenzie: I believe that the tender made no pension provision for the people who transferred. We offer all employees the opportunity of participating in a pension scheme. We have a money-purchase scheme, which I know is not exactly the same type of pension scheme that the transferees enjoyed in their local authority employment.

Joe Burns: We offered those transferees full protection of their pension rights on transfer.

Tommy Sheridan: To how many people did you offer that protection?

Joe Burns: Again, drawing from the Audit Scotland report, which my colleague has conveniently provided, the estimate for the total number of employees who were eligible for transfer was a figure that was just short of 700. The actual number who transferred was 65.

Tommy Sheridan: In the past two years, the companies have collectively received £250 million of public money to carry out the requirements of the contracts. Are your companies based in the United Kingdom for taxation purposes?

Alan Mackenzie: Yes. I confirm that BEAR Scotland is a Scottish company.

Joe Burns: We are currently owned by a Spanish company, and I believe that for taxation purposes the accounts are reported in Spain. I am not absolutely certain, but I believe that tax is paid in Europe—it is paid in Spain.

Tommy Sheridan: I appreciate that you might not have the answer right now, but could you confirm in writing whether tax is paid in Spain or whether Amey has an offshore arrangement?

Joe Burns: Yes. I apologise, but I am not a taxation expert.

The Convener: When the contracts were let, one fear of local authorities was that private sector contractors might beat them on the bids that were submitted for routine maintenance and winter maintenance. Obviously, that happened in the tendering process, because your organisations submitted the lowest tender in each area.

The concern was raised that there might be an increase in the value of work done outwith the contracts, for items of work that are valued at between £150,000 and £3 million and which are put out to tender separately. I do not know the figures—I am asking a genuine question. I note from the PAG report that, in the most recent year,

£32 million-worth of work was carried out under contracts of between £150,000 and £3 million, which represents 26 per cent of the total work undertaken in that year. How does that compare with the figures for the total work carried out prior to the tendering in 2001?

Alan Mackenzie: Do you mean what percentage of the work in the previous contract was put out to competitive tender?

The Convener: Yes.

Alan Mackenzie: I cannot answer that.

The Convener: I accept that you might not have the answer. I intend to put the question to Executive officials later. I was just asking in case you had a feel for the issue.

Alan Mackenzie: I am sorry—I do not.

Joe Burns: Likewise, I apologise, but I do not have the figures to hand.

Alan Mackenzie: All I can say is that we regularly liaise with the Civil Engineering Contractors Association and have done so since the start of the contract. From an industry standpoint, CECA is happy that there is competition and that a lot of work goes out to competitive tender. In addition, while we do work ourselves and have the right to do everything up to £150,000-worth of work, the vast majority of the money that we spend goes on work that is subcontracted out to other companies and to local authorities to carry out the service for us. That is why I said at the start that everyone perceives us as a contractor, when in fact the largest part of our turnover is accounted for by management, maintenance supervision, specialist design and so on. That is where we do most of our work.

I talked about winter issues, which are not just about plant resources and so on. For example, if you double the number of gritter drivers to provide a better service in winter, you have to find work for them to do in summer. That raises another issue that is not always simple to deal with. I have many sleepless nights thinking about that. However, my point is that a lot of our work is subcontracted out to private companies and local authorities.

The Convener: I note that all four works contracts came in, on average, 5 per cent below budget in 2003-04. However, the PAG report states that

"Average out-turn costs tended to be higher than tender values",

most prominently in the north-east,

"where the difference was 18%."

Why was that the case, when we have tight control of the costs within the regular part of the contract? I realise that your companies will have been

involved on some occasions and that other companies will have been involved on other occasions. However, in these tender processes, why is there as much as an 18 per cent gap between the tender value and the outcome value?

15:45

Alan Mackenzie: Just to avoid any doubt, I have looked at past records and found that neither BEAR Scotland nor Amey bid for many works contracts in the past. Tender results can vary dramatically, depending on the amount of workload in the industry when the money is being spent and staff estimates of a contract's worth at the pre-tender stage. Obviously, tendering for work valued at between £150,000 and £3 million is completely competitive, and market forces will dictate the price. Sometimes, we get the estimate wrong. Fortunately, at the end of the year in question, the client gave us some additional funding. That meant that we were able to have jobs on the shelf to deliver those works contracts—that is what we call jobs that are bid for externally. However, the industry can be busy at certain times and we are affected by the vagaries of the market.

Bill Taylor: It is important to point out that, sometimes, the entire budget is not available at the start of the year; instead, it develops throughout the year as funds become available. That affects the process. As far as the north-east is concerned, the combination of significant traffic management issues, the complexity of the work and the fact that not a lot can be done in some locations can mean that the cost of such jobs varies dramatically in comparison with traditional works.

The Convener: Would increasing the limit at which further jobs are taken out to contract, which would mean including more jobs within the core tenders, achieve better value for money?

Alan Mackenzie: The short answer is yes.

Joe Burns: Key value-for-money issues for any contract are consistency, continuity and how we gear up to deal with these matters. Alan Mackenzie has already alluded to winter maintenance. If you can perform a balancing act and give a team that carries out work in winter something to do in summer, you will have a very efficient process.

If a certain type of organisation can deliver schemes of a certain type or size, putting such schemes into a package of works for that provider would have real merit. The question whether such schemes should be incorporated in principal contracts or whether we should come to a long-term arrangement with another organisation requires a finer judgment, and we need to get that

balance right. However, value is really delivered by having continuity of action, which allows an organisation to gear up, train people and introduce safety measures and ensures that, for example, there is no down time and the organisation invests in the right equipment. We need to think about that kind of intelligent procurement, which requires us to be proactive, to recognise what is being procured and to acknowledge that we must have continuity.

Alan Mackenzie and Bill Taylor both referred to the cyclical nature of spend. If we want value for money, we have to get that cycle right. For example, we are now in what is called mad March, when the Executive and every other highway authority realise that they still have some of their budgets to spend and wonder how they can do so. Such an approach cannot possibly achieve value for money for the taxpayer. As a result, we must find out how to achieve continuity and a spread of spend through the year. That is a challenge; sometimes it is not possible to meet it, which means that we have to pay the price. However, it is in everyone's interests to work together as much as possible to ensure that we meet that challenge. After all, the industry does not necessarily make any more money in mad March than it does in the rest of the year, because it has to buy in equipment in the short term and recruit additional staff at the last minute. This is not about the profitability of industry; indeed, a more steady state workload for industry is likely to lead to a better profit for the companies and—an interesting corollary—better value for the taxpayer.

The Convener: I am intrigued by the fact that you mention that. It seems to me that there should not be any driver for the Executive to behave in that manner, as it has the power to roll underspends forward into the next year. You are saying that the Executive is behaving illogically, in terms of the most efficient use of its money. We may well draw that out in our questions to the Executive this afternoon.

Joe Burns: The Executive is not alone in taking that approach.

Alan Mackenzie: It happens all around the UK. If you drive anywhere in the UK at the moment, you will see that road works are being carried out everywhere on behalf of local authorities or under Highways Agency contracts. I have been in the industry for 20-odd years and see it happening every year. The situation is getting better, but it still happens.

The Convener: That is the end of our questions, for the time being. Thank you for the evidence that you have given us this afternoon, which has been helpful to the committee.

We move on to our second panel of witnesses. I welcome two representatives from the Society of Chief Officers of Transportation in Scotland: Tom Walker, the head of roads and fleet maintenance for Scottish Borders Council; and Jim Valentine, the head of roads for Perth and Kinross Council. I invite you to make some introductory remarks, after which we will move to questions and answers.

Tom Walker (Scottish Borders Council and Society of Chief Officers of Transportation in Scotland): I am from Scottish Borders Council, but we both represent SCOTS and will speak with a broad view on the effect that the contracts have on the road network and on our constituents. I have submitted a written paper in which I try to clarify the issues by working through the remit of your inquiry and highlighting points. The paper also includes some background information.

There are two distinct parts to the contracts. The first part concerns motorways, main dual carriageways and main roads, which used to be covered by a separate generation 1 contract. The second part concerns the many rural trunk roads on which there is a significant amount of local traffic. There is considerable unease among local constituents about the way in which the contracts operate on those roads.

The first part of the inquiry's remit concerns the recommendations that were made in the Audit Scotland report that was published when the current contracts were awarded. I noted three specific matters that the report picked up. The first was the time pressure. That has now been overcome, as the process is under way. The Scottish Executive has split the four contracts into two pairs with different timings, which should relieve that pressure. The second matter was the fact that there was insufficient information for contractors. That should have improved greatly, as a considerable amount of information has been gathered during the process. Nevertheless, there is a problem with the continuing lack of agreement on boundary issues where trunk roads and local authority roads separate. There was a problem with street lighting specification, but my understanding is that that will be changed under the new contract. I will comment more on that later.

The third area of concern was the complex process for assessment. Reference has been made to the 40,000 items that had to be assessed in the bills of quantities. Interestingly enough, only about seven of those items refer to winter maintenance. They are all lump-sum items. In my field, seven lump sums are just equivalent to one lump sum. Perhaps some of the problems that have been hinted at are more to do with the specification pricing than with the actual

specification. I will pick that up later, when I come on to integration.

Another problem with the assessment process is that of quality. In the previous round, the documents indicated that there was a quality threshold. The implication was that as long as the quality threshold was passed, the next consideration was the lowest price. At the pre-tender meeting in December, it was not very clear whether that approach was to continue. The Scottish Executive officials seemed to have two different views. In the previous round, it was a matter of judging quality against price assessment, which led the local authority groups to think that the process was not sound. In fact, court action took place.

Three further changes need to be considered. First, there does not seem to be recognition of the increased democratic demands from the public and road user groups. Secondly, it appears that the whole community planning initiative, which is being expanded through local authorities, is not getting picked up. Thirdly, it appears that the opportunities arising from the proposed new regional transport partnerships are not getting picked up either. I would have thought that the tender documents should at least refer to, or include the opportunity to pick up, those opportunities.

The second part of the inquiry's remit is

"The extent to which the current contracts have met the objectives of the Scottish Executive and wider interest groups".

I can speak for some of the "wider interest groups". As I said, there is a shortage of democratic accountability in rural areas, particularly where rural trunk roads run through towns. Under the old agency set-up, locally elected council members could pick up points and sort them out with the relevant officers. Major matters went to the Scottish Executive and were always reported back through locally based officers. The public felt that they had some communication through that process.

On a similar but wider issue, we seem to be missing community planning out of the process. In areas where local traffic is as heavy as through traffic, with agricultural traffic and local businesses relying on the roads, community planning must come into play. Scottish Executive officials are invited to area committees in my area, but they generally decline to attend.

The next area in which the needs of local road users in particular are not being met is that of street lighting. There are more complaints about street lighting in our area than about anything else on trunk roads. The specification is suitable only for dual carriageways and motorways, where there

are few junctions and probably even fewer pedestrians. That allows batches of lights to be out for months without being replaced; lights are replaced only when a bulk replacement is carried out. If trunk road lighting is adjacent to local authority lighting, there can be a significant contrast, and safety issues must be involved in those situations. Such incidents are generally reported back through the local authority office, but the process thereafter is more clumsy, as we need to go through the contractors.

The situation has been made worse by poor performance by ScottishPower—both local authorities and contractors have experienced that. There is to be a change in the new contract, but I cannot see why it should not take place now, under the existing contracts, which have a year or two years to run, and it has been suggested that change might indeed take place under the existing contracts.

The issue of boundaries relates to the lighting set-up. There has not been a clean, clear definition of the boundary between trunk roads and local authority roads, and it is particularly important to sort that out in towns. In the same category, we have problems in long valley single carriageway routes. Because of the narrowness of those roads, we often have to close them to heavy goods vehicles and buses or, at times, all traffic during road works. There needs to be an increase in consultation with the local community, not just because of the effect of such a diversion as a traffic exercise but because of its effect on people's businesses and on tourism in the area during the period of the diversion.

16:00

The third area of the inquiry's remit concerns

"The implications of trunk roads and non-trunk roads in the same area being maintained by two different contractors".

Generally speaking, the works side is going well. In our area, we are a subcontractor to Amey and are involved in most of the works. A related issue is that of the trunk roads that run through our small towns, such as Lauder, Selkirk or Hawick, with their historic features, shops, schools, pedestrian crossings and so on. The contract does not sit comfortably with that scenario. Boundary problems are a continuing issue; problems arise when the council is involved in overlapping traffic, road safety and planning issues, as the public can become confused about who does what.

I turn to the issue of integration. I heard the comments from earlier witnesses about the integration of winter routes. I led one of the bids in the previous tender process, and we were told clearly that the integration of local authority and trunk road routes was not permitted in our

submission. We share the experience that I heard described earlier of vehicles that maintain trunk roads running along minor roads to get to trunk roads and of local authority vehicles accumulating dead mileage on trunk roads to reach an offlet on a minor road. The question of where depots are located is also a factor. Integration has been missed from the tender documents and yet this is an excellent opportunity for making the sort of low-cost improvement that would give better value to the public.

The benefits of integration apply not just to the winter maintenance aspects of the contract but to other works. I take the example of a long stretch of road with a number of small road inlets. The drainage system for such a road will include gulleys in the side road that connect into the main road drainage system. I could also give examples in connection with lighting, signage, white lines and so on. It is not effective for one contractor to do bits of work under its contract while another contractor does the main part of the work. The issue of integration should be considered, as greater integration would reduce dead mileage and give better value.

Generally speaking, people find the work side of the renewal of carriageway less confusing. From our point of view, the winter maintenance programme is a good, professional process. We receive few complaints about that side of the contract—Jim Valentine may want to add something on that point. The only problem occurs when, as part of our local authority role, we attend area committee meetings in areas where we also act as a subcontractor. We are sometimes questioned on issues relating to the trunk road and have to decline to answer them because as we are only the sub-contractor, we are not involved in the process. That adds to the frustration that communities feel about the issue.

Liaison meetings are held between the Scottish Executive, the contractor and the local authority. Although those meetings are of benefit, we still have to resolve the boundary issue—I think that I have said that about three times. The split of ownership between the local authority and the Executive of lighting and signage at the boundaries is an unresolved issue—I am talking about physically splitting circuits for safety reasons. The terminal points of footway bridges and underpasses also remain unresolved.

My understanding is that a definitive set of drawings were prepared for the 2G contract, before the first tender process, but those drawings were definitely not issued during the tender process. The council held discussions with the Executive that nearly reached agreement, but the boundary definitions were changed and formal agreement has not been established yet. That is a

problem for the contractors who are going forward with the 3G contracts.

The final point that we were asked to cover was

“Whether the Executive considered any alternative approaches to the re-tendering process”.

The division of the process in two—with one north and one south contract being tendered for now and the remaining areas being dealt with a year later—gives us an opportunity to make the process easier to deal with, work better and give better continuity.

However, no consideration seems to be given to the opportunity to unbundle some of the rural trunk roads and mix them with roads that are under the control of the local authority, although it is clear that budget support would be required for the additional responsibilities. That would be relatively easy and, as I said earlier, it could be quite cost effective. Further, it would deal with a lot of the rural community's questions. However, we seem to be going in the right direction with regard to the regional transport partnership.

Generally speaking, we think that the operating company approach is ideal for motorways and major dual carriageways but that there is a shortfall in the requirements for rural single carriageways. We think that there is too much of a works contract approach and not enough of a public service contract approach. That is not entirely in line with the audit of best value that we are being asked to carry out in relation to the things that we do.

The Convener: You seem to be suggesting that the existing contract militated against the sort of partnership that some members were talking about earlier, whereby the trunk road operator and the local authority could reach some mutual agreements, such as those that you mentioned, which involved someone having to travel down an extensive length of trunk road to be able to grit a local road. Does the contract not allow you to bid on the basis that you will make economies based on such co-operation or is there a barrier to the local authority and the trunk road operator reaching an agreement once the contract has been awarded?

Tom Walker: That is slightly difficult to answer. I was told that we could not integrate local authority and trunk road operations when we were bidding as a partnership between the local authority and a contractor in the private sector—the local authority was going to include integrated routes in the contract at that point. In the current contract, we are a subcontractor to Amey, and the crew that deals with the trunk roads is separate from the crew that deals with the council roads. The approach is not integrated. Although there are administrative difficulties in integrating the

approach, overall, there is an opportunity for increased efficiency.

The Convener: During the previous tendering process, some acrimony developed between local authorities and the Executive. I do not expect you to commit either your local authority or others, but do you think that local authorities in general will express an interest in trying to tender for the contracts themselves or do you think that they will not now have the capacity to do that?

Tom Walker: Obviously, I have asked other local authorities whether they are prepared to bid. We have kept our strength because we have operated as a subcontractor and have undertaken other operations. The general view, however, is that local authorities do not have the resources in terms either of manpower—as many of the workers have transferred or retired—or finances. The bidding process is extremely expensive. Judging by what the south-east bid cost the last time, I would say that the local authority part of the bid would cost around £250,000. We cannot afford to risk throwing that money away on another bid.

The Convener: In terms of manpower, if a local authority's bid were to be successful, I assume that TUPE would work in reverse. The last time round, staff transferred from the local authorities and I assume that, if a local authority's bid was successful, much of the necessary manpower would already be in place.

Tom Walker: I accept that, but a considerable amount of manpower is needed during the tender process. Our bidding team had about 15 members and I am sure that other councils' teams were the same size or larger. That is a resource that is not available in local authorities now, as we have trimmed ourselves down.

The Convener: Michael McMahon, you were one of the reporters on this issue. Do you want to ask some questions?

Michael McMahon: I am particularly interested in the point that was made about the unbundling of the roads contract. What would be the consequences of breaking down the contract into small areas? How would we benefit, should that situation arise?

Tom Walker: There would be opportunities for better integration and, therefore, for better value in rural areas. The travel costs would be less, because it would be possible to do trunk roads and the local authority units as one operation, as happened prior to 1996 and, in some cases, 1999, when the councils conducted operations on the minor roads on an agency basis, and the charges were split between the Executive and the local authority through administrative coding.

The cost to local authorities of carrying out drainage off trunk roads in rural areas has obviously gone up because they must cover a lot of dead mileage to clear gullies and drainage systems. The same is true of scattered lighting and road marking. I am not saying that the benefits would be entirely the Executive's, but overall there would be gains to the public purse.

Michael McMahon: Your proposal would also alleviate the confusion about what is a local road and what is a trunk road. Is that just a side benefit?

Tom Walker: The average member of the rural public does not care whether a road is a trunk road or a local authority road; they just want the work to be done and they want to know who to complain to if it is not done. The proposal would at least resolve those problems.

Michael McMahon: The overall concern is that the specifications must be correct. Would not the introduction of additional, possibly unquantifiable specifications add to the difficulties?

Tom Walker: Other than the street lighting specifications, I do not think that the specifications—even the winter ones—are too bad. In my mind, it is the way in which the winter maintenance is paid for that creates the problem. The specifications are general and we have codes of practice governing the frequency of cleaning and repair and all the operations that we do, so I do not see a problem with that. There is an administrative problem to do with charging, but we resolved that many years ago.

Michael McMahon: I am interested in the idea that the proposed regional transport partnerships could assist in some way. Will you expand on why you think that would be beneficial? Would that have an impact on the tendering process?

Tom Walker: Jim Valentine can answer that.

Jim Valentine (Perth and Kinross Council and Society of Chief Officers of Transportation in Scotland): The last time I appeared before the committee, when I was speaking about Audit Scotland's report "Maintaining Scotland's roads", we spoke about whether the network was correct. We discussed whether the A977 link to the Kincardine crossing should be a trunk road and whether the A85 and the A84, which run through urban communities, should be passed back to the local authority. If SCOTS had been consulted at an earlier stage of the process, before the pre-qualification discussions took place, it would have been good to have thought about some of those routes in the context of the regional transport partnerships. We could have considered whether local authorities would want to proceed with a strategic road maintenance policy by taking back

some of the trunk roads and passing over some of their roads.

Michael McMahon: That goes into another area. As some practical difficulties have been thrown up, I hope that the convener does not mind me bringing up the Transport (Scotland) Bill. We have asked whether the RTPs have the right boundaries, given the administrative responsibilities that they will have. Are you saying that the way in which the contracts are designed, whereby there are contracts for the south-east, the south-west, the north-east and the north-west, adds to the practical difficulties?

Jim Valentine: I am not saying that; I am saying that the way in which the network is set up at the moment gives us some practical difficulties. I think that there are some trunk roads that might be better managed as local roads and some local roads that would be better managed as trunk roads.

Tom Walker: That was what I meant. For example, part of the role of the relevant RTP will be to deal with bus transport for the Borders. That responsibility will last until 2008, thanks to what the minister said yesterday. There are two main routes from the central Borders—one is a council road and the other is a trunk road. Part of our route action improvements will be on the trunk road. It would be better if we could run all of that work together as part of the RTP approach. Some of the rural roads that we are talking about should be reconsidered so that they fit into the RTP philosophy. That might not apply to the motorways and the main dual carriageways, or even to the A1 and the A9, which are main arterial routes, but it will be difficult for regional transport partnerships to do anything about passengers and the public on roads that run through the middle of towns unless there is an integrated approach.

16:15

Michael McMahon: Would the best starting point be a reconfiguration of the roads that are the responsibility of the trunk road contracts or should we consider the responsibilities of the regional transport partnerships?

Jim Valentine: Both approaches are needed.

Tom Walker: We need to do both—that is the safe answer.

Fergus Ewing: Will Tom Walker explain what he meant when he said in relation to winter maintenance that the problem lies in the lump-sum method of payment?

Tom Walker: In the generation 1 contract, payment was for what a person did in relation to premier routes. If they did a mile of gritting or snow clearing, they were paid on a time or distance

basis. However, the current contract makes payments on a lump-sum basis, so there is no financial incentive to increase the number of snow ploughs on a route that is blocked by snow, for example. When local authorities did that work, they would pull some vehicles off the local roads and deploy them at the crucial points on the trunk road, because not much would be gained by clearing the local roads if the trunk roads were not clear and traffic could not get moving. We could move our resources around until traffic was running on the trunk roads again, in the knowledge that we would be paid for the work that was done. We could use the equipment more flexibly in the knowledge that we would get paid for using the additional vehicles that we had deployed.

Fergus Ewing: Are you arguing that the specification of the contract provides for lump-sum, fixed payments, which is an in-built disincentive to whoever wins the contract to do a little extra when that is required as a result of unexpectedly severe weather?

Tom Walker: Yes, that is my view.

Fergus Ewing: Can that be correct? I am no expert on the contract's wording, but I understand that there is a difference between precautionary and unplanned salt use. Obviously, weather forecasting is used—I think that a temperature of 4°C is the trigger. Precautionary salting takes place, but sometimes the weather is worse than was forecast. In such unplanned situations, does the contract provide for extra payment? Surely that must be the case.

Tom Walker: My understanding of the contract from having bid previously is that the only variation in the payment relates to the number of days' activity in the year, which is related to the Met Office open road index—the MOORI index. A complex formula has to be applied.

I was referring mainly to snow clearing. Planned gritting is reasonably predictable: the routes and the number of vehicles that will be needed can be planned in a mathematical exercise. However, it is difficult to predict how many snow ploughs will be needed, particularly if snow is drifting. If we swamp an area at a specific time, we might get on top of the situation. I do not think that the method of payment encourages the approach that is necessary for snow clearing. The system is fine for gritting: the specification is clear and well understood.

Fergus Ewing: Surely there must be provision in the contract for extra payment if the weather takes a turn for the worse and the temperature plunges below the trigger of 4°C, so that unplanned gritting is required.

Tom Walker: That is not my understanding.

Fergus Ewing: Okay; we will put that to the minister. I agree that if the situation is as you describe it, it creates an obvious disincentive to any company to do more than is required by the contract. That relates to the purpose of the committee's inquiry, which I suggested that we undertake, so I am grateful that you put forward that thesis and we will ask the minister about it. If the witnesses from the companies who are still listening to the evidence have any comments on the matter, we would welcome their input for clarification, because I suspect that there is a little more to this than meets the eye.

Neil Greig of the AA made the specific criticism that the performance audit group "reports too infrequently". In particular, he gave the example that the report on winter maintenance for winter 2003-04 was not out until September the following year, by which time people's memories of bad weather had long since gone. Would it not be helpful if the performance audit group reported far more promptly after the winter maintenance period is over? Is there any impediment to the group's so doing?

Tom Walker: I would not have thought so, but I have no contact with the performance audit group on that contract. When I read its last report, I was looking specifically for comments on the lighting problems that we have in the south-east and in all rural areas, but I could find none. There was a short statement about lighting in one of the north contract areas but, considering the number and frequency of complaints about lighting, I would have expected to see something about it. PAG has to report regularly if it is to be meaningful.

Fergus Ewing: In your submission, under the heading "Complex process for assessment", you describe a discussion about quality that you had with the Scottish Executive in December at the pre-tender meeting, and state:

"it appeared that the assessment process which has a so-called quality threshold but no quality/value assessment is to continue. This was not entirely clear as SE officers seemed to give different views of this."

Can you describe what those different views were?

Tom Walker: The meeting was an open meeting for anybody who was considering tendering. I went along in case the local authority decided to bid. The question was about quality assessment. To me, awarding a quality contract requires evaluation of quality on a points basis, evaluation of price on a points basis, and some pre-agreed and pre-described formula for combining the two, following which the contract is awarded. We have bid for several such contracts in the past, and we have put out quality contracts ourselves.

With the last contract, there was a general quality threshold that, if reached, allowed you to go forward to tender. About four or five tenderers in each area reached that first threshold. There was then a second quality threshold, which required you to submit your tender document. If you did not reach that threshold, your price tender document was not opened. If you did, it was opened, then the decision was based entirely on price. I would not describe that as a quality tender process, and I think that Jim Valentine would agree.

Jim Valentine: Yes. In the past, particularly when we put out the Scottish road maintenance condition survey contract, the advice from our lawyers has been that we have to be absolutely transparent about what quality is being judged on, and the two processes have to be kept separate. Tom Walker is saying that the advice that he was given was that that was not necessarily the case. It was not the case with the last contract, and it might not be the case with this contract.

Fergus Ewing: I ask because I am puzzled. We are talking about the way in which the tender process operates, and how it takes account of quality versus price. The process seems to be that the Executive seeks pre-qualification questionnaires, then considers the responses and assesses quality. Then, if tenderers satisfy the quality test, it moves on to assessing the lowest price. Is that not what tendering is and should be about? You identify companies that can do the work—they have the capacity, employees and equipment—then satisfy yourself that you have reputable companies of reasonable financial standing with the physical ability to fulfil the contract. Then, the point of tendering is to save money for the taxpayer and get the lowest price. Is that not what it is all about?

Tom Walker: That is fine if it is not being said that it is a quality contract. Someone could offer significantly higher quality than another contractor for a very narrow difference in price, but the quality difference would not be assessed. The concern is purely the threshold—tenderers are either over the line or not.

Fergus Ewing: I am slightly puzzled. Surely each tenderer submits a tender that meets the requirements of the specification.

Tom Walker: Yes.

Fergus Ewing: Are you saying that last time and this time, a huge gradation has been involved? Are you saying that some tenderers offer gratuitously to beat the required level of quality—the quality threshold—for trunk road maintenance? That does not seem plausible.

Tom Walker: All that I am saying is that the situation is confusing, because it is unclear. If it is

an outright lowest-price process, that should be said, and what should matter is that a tenderer has passed the first threshold, not having a second threshold.

Fergus Ewing: I certainly agree that the Auditor General's report says that the UK Government's approach is to require quality to be taken into account, but lowest cost seems to be the ultimate criterion, so some confusion exists. Perhaps we can question the minister on that.

Tom Walker: I suggested that as part of the changes for the next tendering process, because it struck me that the current process would be the same as before, and great confusion reigned during the generation 2 process.

The Convener: That concludes our questions. I thank Tom Walker and Jim Valentine for their evidence.

16:26

Meeting suspended.

16:38

On resuming—

The Convener: We continue with agenda item 4, which is consideration of the trunk road maintenance contracts. The next group of witnesses comprises representatives of the Scottish Executive. I welcome Nicol Stephen MSP, who is the Minister for Transport; Jim Barton, who is the head of the Executive's trunk roads network management division; John Howison, who is the head of the trunk roads design and construction division; and John Gooday, who is the national network manager for the north-west unit in the trunk roads network management division.

I am sure that you will have heard some of the previous evidence, so you will be aware of some of the committee's lines of inquiry. I ask Nicol Stephen to give an introduction on the Executive's intentions for the new round of trunk road maintenance contracts.

The Minister for Transport (Nicol Stephen): I have fairly lengthy opening remarks, which I will try to truncate. That would be appropriate because I am sure that the committee will want to continue the flow of questions.

It is worth pointing out that one of my predecessors asked the Auditor General to review the tendering process after the award of contracts in 2001. The report following that request, entitled "The new trunk road contracts" and published in November 2001, concluded:

"Overall the Department implemented these large and important contract competitions fairly, properly and with due regard to value for money. There is no basis to suggest that

any bidder offered lower prices overall than those of the selected bidders. The new contracts should provide greater economy and a stronger basis to achieve value for money in a significant expenditure programme."

We continued to explore a number of issues relating to the process. The Auditor General reflected that the department accepted that there were lessons to be drawn, and four specific issues were expanded in his report. He also observed that improved service and value for money would depend on how the operators performed. Because of the controversy and the consequent delays preceding the award of contracts, the mobilisation period that was planned to be available to the contractors was considerably reduced, which resulted in difficulties with important aspects of the initial performance of the new operating companies.

Although the Auditor General recognised that the department was managing the initial problems, he called for it to continue to monitor closely the performance of both contractors and to report publicly on performance progress after the first year of operations. Officials commissioned that work from the performance audit group, a consortium of Halcrow in association with Scott Wilson and PricewaterhouseCoopers, which were appointed on a seven-year contract in 2002 to oversee the compliance and propriety aspects of the maintenance service providers.

The initial and two further annual reports have been published by the performance audit group. The first report concluded that, over the year, each contractor had broadly met its contractual requirements. Although there were areas where improvements were still required, their performance had been comparable with the performance in the previous year under the former operators. In the second year, the contractors were noted as having broadly met their contractual requirements over the year, and their performance had continued to improve, with some still-existing problems requiring attention. The report covering 2003-04 recognised that the third year of each contract had been successful.

The operating companies have broadly delivered their obligations under their contracts. Officials have acknowledged the lessons that have been learned from the second-generation competition and, as a consequence, have initiated a tender competition for the next round of contracts. The existing contracts were awarded in 2001 for a base contract period of five years, extendable at the option of the Scottish Executive for up to two years. Arrangements to invite tenders now for the north-west and south-west units are founded on advice from the Auditor General. The second-generation contracts concentrated on improving management of the works. For the third-generation contracts, officials in the Enterprise,

Transport and Lifelong Learning Department will incorporate improvements in how works and services are delivered—for example, grass cutting and winter maintenance—drawing on their experience during the second-generation contracts.

The Convener: Thank you. I shall bring in the two reporters before inviting other members of the committee to ask questions. On this occasion, I give Fergus Ewing the first opportunity to question the minister.

Fergus Ewing: Thank you.

At the end of your opening remarks you stated that improvements to winter maintenance would be incorporated in the tender specification. Can you provide more detail?

Nicol Stephen: I cannot provide all the detail, but perhaps my officials will help with that. However, it is fair to say that those two issues—landscaping and grass cutting, and winter maintenance—are the issues that I have to deal with most regularly in responding to the concerns of local people, road users and MSPs. Since becoming Minister for Transport, I have been anxious to ensure that, wherever possible, detailed attention is paid to complaints and a positive response made. It has become clear that the contractors are fulfilling the requirements of the base contracts, which is why it is important that we take this opportunity to consider whether the contract specification rather than some fundamental problem with the concept of contracting could be strengthened, tightened or improved to ensure a higher level of service in particular areas. Perhaps Jim Barton will comment on some of the areas for improvement.

16:45

Jim Barton (Scottish Executive Enterprise, Transport and Lifelong Learning Department): I was listening to the earlier discussion. Although we are broadly happy with the specifications, there are certain areas where we can improve things. In winter, Scotland suffers from marginal conditions on the freeze-thaw edge and winter maintenance is one of the most difficult areas to deal with. We believe that the operating companies are broadly meeting the requirements of the specification, particularly in the worst weather. However, we can do certain things to improve the contracts in respect of the marginal conditions. John Gooday has more information about that.

Fergus Ewing: I was really asking whether you could tell us what the conditions are. I appreciate all the background; we have read the documents and know that contracts have been fulfilled and we know what the Auditor General said. I really want to know what extra measures you will introduce to

the tender specification to provide even greater safety for road users, many of whom complain to me that this is a possible life-or-death issue.

John Gooday (Scottish Executive Enterprise, Transport and Lifelong Learning Department): We have considered a number of areas. We first considered the winter period for which we mobilise, which runs from 1 October to 15 May. That is probably longer than any local authority's winter period, and we provide a 24-hour, seven-days-a-week service. Other witnesses have spoken about the fact that councils do not provide such a service. That is the base of the specification.

The other main element of the specification is response time, which was also touched on earlier. It is basically the same as it was when the code of practice was brought out in 1993. Previous councils worked to that code of practice and it informed first and second-generation contracts. Although there have been some improvements on the code of practice, it is still very much the base of practice. We considered the response time and did not feel that to change it was necessarily the answer. As Jim Barton stated, there are issues in respect of marginal conditions and we have to consider the decision-making process and what the contract says about it. The key issue is timing: when we go out; when we repeat treatment; what information we collect from the weather forecaster; what information we collect from the ice stations on the network; and how we interpret that information and use it to provide a service. We are trying to strengthen the words of the specification to cover that.

Another matter is how we get the salt on the road. Many European countries use a system called pre-wetted salt in which instead of pouring dry salt out of the back of the gritters, the salt is pre-wetted with brine. The advantage of that is that in more marginal and drier conditions, more of the salt will stick to the road and it is more effective more quickly. Alan Mackenzie was talking about the difficulty of going out in less than favourable conditions; dry conditions are less than favourable, and pre-wetted salt would help that. The idea is that we will get a price for pre-wetted salting and consider it as a possible option for the specification the next time around. Of course, value for money will also have to be considered.

Fergus Ewing: I am pleased about the liquid salt, if I can put it that simply. That was your final point.

John Gooday: There is an element of brine, but we are still talking about dry salt that is wetted before it hits the road.

Fergus Ewing: The Auditor General mentioned pre-wetted salt as an option that was not pursued

initially. He said that one of the possible consequences of its introduction might be that different equipment or vehicles would be required. Is that correct?

John Gooday: Absolutely. The advantage of bringing pre-wetted salt in at the start of the contract would be that the contractor would be able to spread the capital cost of providing the new equipment throughout the life of the contract. It would be much more cost effective to spread the cost over five years than it would to bring in new equipment half way through a contract. If the system was brought in now, there would only be one or two years to go so it would not be a cost-effective solution.

Fergus Ewing: I am not a technical expert, but the Auditor General mentioned a specific way in which winter maintenance could be improved using an innovative technique. In your December meeting with prospective tenderers, did you discuss the cost and consequences of that and did you give them information that would enable them to prepare the ground for submitting their bids?

John Gooday: I do not recollect our going into that level of detail when we met.

Fergus Ewing: I would welcome that improvement, subject to hearing other views about how technically efficacious the system would be. Lots of constituents have told me that timing is crucial and that if roads are not gritted at the right time, it can be too late to do it subsequently, which we all know as lay people.

Nicol Stephen: It is fair to say that, under the existing contract, I have been concerned about the issue and the explanations that have been given for why a road has or has not been salted. If the weather forecast is that conditions will be dry, the road is not necessarily salted—my officials will correct me if I am wrong. Under the existing contract, although the temperature might be 0°C or below, if the weather forecast is for dry conditions, we do not get the road salted. It seems to me that quite often the weather forecast can be wrong or—

Fergus Ewing: I thought that the trigger was 4°C, not 0°C.

Nicol Stephen: The trigger for water freezing is 0°C. If conditions turn wet and the temperature is 0°C or below, ice can still form, but the road will not have been gritted. I am not changing the specification; I am just explaining what can occur. I have been concerned about that and have asked that the use of pre-wetted salt be investigated. It would have to be brought into the contract in the most appropriate way; it seems to me that that would be to do so from the beginning of the new contracts in order to allow the investment to be made. We need to consider seriously what

temperature would trigger the use of pre-wetted salt. The 4°C figure, which is the correct figure to which Fergus Ewing referred, would need to be assessed in the light of the best evidence of the use of pre-wetted salt in other countries.

I have a list of improvements such as ensuring that when overnight patrols are undertaken the patrol work is carried out using loaded salting vehicles, ensuring that there is global positioning system tracking on all the vehicles and having improved data loggers to track what happens during a salting run, because there is often an issue with getting accurate data about what has happened after a run. All that is about getting better information about what is happening on a road surface. It seems to me that although the work that is carried out fulfils the terms of the contract, serious icing problems often arise. In any review of the contract we will consider not only whether the Auditor General and the performance audit group's investigations find that the contract has been fulfilled, but how to ensure that the roads are ice free and safe for drivers to use. That means that we have to be determined to introduce new technology, better monitoring and pre-wetted salt. Such initiatives could make significant differences. We should be prepared to be innovative with the next generation of contracts, so now is the time to move such matters forward.

Fergus Ewing: Mr Gooday said that one of the improvements in specification would relate to marginal conditions and would affect decision making. He said that the new spec will "strengthen the words". I have no idea what that means. Can you explain what that will mean in the specification?

John Gooday: Only a few days ago, we met BEAR Scotland to examine some of the incidents about which the minister was concerned. There was much discussion about the decision-making process—how and on what basis people were making decisions. We still have to drill down further into that, because it is a particularly difficult area. With hindsight, given some of the information that was available, one might suggest that BEAR Scotland should have done something. We want to include wording in the specification that makes it clear that, if a decision is marginal and doubtful, we would prefer that the contractor err on the side of being more conservative. I am not sure how we should craft the final wording, but it is being worked on as we speak.

The Convener: The witnesses from SCOTS suggested that part of the problem was the way in which winter maintenance is paid for. A block sum is paid, so the contractor does not really have an incentive to do that little bit extra to deal with difficult situations. Do you accept that criticism of

the existing contract? Are you trying to resolve the problem?

John Gooday: There is a balance to be struck. From day 1, we recognised that the block sum is a problematic area. As Tom Walker said, when we introduced the first generation of contracts, we took a slightly more conservative line and paid for everything that happened. However, when we pay for everything that happens, there is a worry that people are overdoing it. We need to get the balance right. The contracts are commercial; people are paid for doing work, so we must ensure that they do the right work at the right time. I am not saying that what we have at the moment is ideal. We can improve on it and make it work better than it does at the moment.

Fergus Ewing: The convener cunningly anticipated my next question. Mr Walker's point needs to be pursued, because his argument was a bit stronger than the one that you have made. He suggested that the marginal conditions of the existing contract contain an in-built disincentive to do more than is necessary and required by the letter of the contract, especially in unforeseen severe weather.

John Howison (Scottish Executive Enterprise, Transport and Lifelong Learning Department): I will say something about the concept of the contracts. The contracts exist to set a specification for work that must be done. The payment mechanism is somewhat secondary. In the case that we are discussing, the specification for what the contractor must do is set out very well, so we do not think that there is scope for the contractor to say that something is not its responsibility and that it does not have to go out in certain circumstances.

Winter maintenance is largely dependent on the resources that are invested in it. As such, it is eminently suited to a five-year regime of lump-sum pricing. Such a regime was introduced, but the MOORI formula provided some adjustment for cases of exceptional weather, to the extent that the operators considered that it would change their cost base. Surprisingly, most of the bidders made no use of that provision—they made a zero adjustment for different severities of winter. That means that they were perfectly clear about the specification requirements that they had to meet. If they did not meet them and we believed that they were failing to address the situation properly, there were step-in provisions that could be brought to bear.

Fergus Ewing: My difficulty with the style and tone of your answer is that lawyers are not drafting contract terms at Drumochter on 29 January in hellish snow conditions. I am concerned that the real problems tend to happen in scenarios where there is unforeseen severe weather. I put it to you

that the aim must be to ensure that, where extra work is necessary, it can be paid for. If it cannot be paid for, there is an in-built disincentive to its being done. Is not that a reasonable objective that the third-generation contract should seek to incorporate? In other words, should not the contract remove any in-built disincentive to doing what may be required in a winter emergency situation?

17:00

John Howison: It is important that the operating companies take decisions on the basis of the information that they have and do not wait to find out whether somebody in Edinburgh is going to pay them in advance. That will always be an issue if the contract is based on the idea that something should be done and then may be paid for, but should really be authorised in advance. I agree that snow in Drumochter is not for lawyers to ponder; neither is it for us here in Edinburgh to second-guess the snow.

Contractors have a legal duty to undertake works because that duty is transferred by the contract. They can face sanctions ranging from those that are contained in the contract to those that are imposed on them as a result of their legal duty. A competent and responsible contractor would not—on a particular night in a five-year contract—avoid undertaking what it is contractually required to undertake for some immediate relief of costs.

Nicol Stephen: Over the past 12 months, exceptional work has been done by the emergency services to deal with landslips, but the operating companies were also involved. First, they ensured that people were rescued—for example, on the A9—and then they got the road back in operation in a remarkably quick time. Clearly, that work involved additional costs, but I do not think that anybody waited for a phone call from Edinburgh to authorise the work.

In winter, a range of situations can arise. One can expect that every winter will bring some very difficult conditions to Scotland's roads. It cannot be predicted when that will happen but we must ensure that we are geared up for it and that BEAR and Amey are ready to take action.

In the new contracts, it will be important to consider the issue that Fergus Ewing has raised. We will have to try to find out whether there has been any disincentive such as he described, and whether we can tackle it in a way that will avoid people having to wait for a telephone call from Edinburgh. Everyone around the table understands the issue; the question is how we can ensure that work is carried out quickly and effectively without some sort of emergency

authorisation being required. Such situations often arise at the most difficult times—for example, in the middle of the night during public holidays. We have to ensure that whoever wins the contract has the power, the authority and the resources—I fully accept that resources will be required—to respond quickly.

Taking this afternoon's questioning into account, we will have another look at the issue. However, if committee members have constructive suggestions, I undertake to consider them. Unfortunately, I did not hear the evidence earlier in the afternoon.

Fergus Ewing: I am grateful for that answer and that assurance. This inquiry is all about ensuring that roads are kept as safe as is possible and practicable in winter, although bearing in mind the convener's earlier admonishment, we should perhaps sometimes use the train. I also say to the minister that, at the beginning of the meeting we, too, paid tribute to the efforts of BEAR at the landslip last August.

The minister asks for constructive suggestions. As always, I say that we must ensure that the local workforce's knowledge—many of them have worked on such tasks for decades—is used to the full. I am sure that companies already seek to use that knowledge, because local knowledge of the particular parts of roads that tend to be the most problematic and most prone to icing has been built up over decades.

I understand that the PAG reports cover contractual winter maintenance but not additional treatments that occur during winter patrols with loaded gritters, because the operating companies are not contractually required to collect data on that. That is a small lacuna that could be filled.

I am pleased that the Executive is responding positively and I hope that that will be reflected in the tender specification.

Nicol Stephen: We understand the point. We will consider those issues and respond as positively as possible. We want to prevent such incidents, about which I receive letters. We can never guarantee safe and straightforward driving conditions on Scotland's roads at all times, but we want to reduce the number of incidents and provide as effective a winter maintenance system as possible. That means that we must deal as quickly and effectively as possible with sometimes horrendous weather situations, difficult levels of snow and unexpected ice on roads. Incidents still occur every winter that I, as Minister for Transport, would wish to avoid. We must consider—and are considering—improvements to the new contracts. We will develop the suggestions that committee members have made this afternoon.

Michael McMahon: The minister said in his opening statement that the contracts were to run from 1 April 2001 to 31 March 2006 and that scope existed to extend the contract period for two years. As you have issued a notice to tender, I assume that you do not intend to use those two years. Will you confirm that and confirm that there is no prospect of extending the contracts beyond 2006?

John Howison: One of the Auditor General's criticisms of the previous round was that we tendered four contracts simultaneously, which produced extreme loading on the Executive departments and on the contractors involved. He recognised that a sound case can be made for breaking the work into multiple contracts, but he suggested that in future, public bodies should stagger contracting exercises to make the workload more manageable and to maximise the opportunity for contractors to bid for each contract. For that reason, we have developed a strategy whereby the first tranche of tendering will proceed now, with a view to replacing two units by April 2006, after which second and third tranches will occur. By April 2008, we will have replaced all the contracts.

Michael McMahon: Will that arrangement have an impact on the cost of the original contracts? Will they be seen to have achieved best value?

John Howison: The original contracts were priced on the five-year period. The extension was an option that was at our disposal. I suspect that it is impossible to answer your question on whether extending an individual contract for the full length of time would be better value for money without seeing the prices that emerge from the new contracts as they are refreshed. However, the practicality of the situation and the Auditor General's advice are clear. We must follow a staged process.

Michael McMahon: I understand that, but companies purchase plant and manage workforces. If they bid on a lowest-price basis for five years, would extending the contracts not have an impact on their ability to continue in the extended period at the prices that they originally quoted?

John Howison: Companies will have tendered on the basis of writing off their investment in the plant over the five-year period. It could be argued that a two-year extension would represent a benefit to them.

Michael McMahon: Conversely, there is an issue of whether they can continue to deliver into the extended period at the price that they said they would charge, given their overheads and the state of their plant as the extension kicks in.

John Howison: They have an obligation to do that.

Michael McMahon: So the extension will have no impact on their ability to retender.

John Howison: I do not—

Michael McMahon: Are we putting a burden on companies? Are we creating a situation in which they will find it difficult to tender on the basis of best value when they are seeking to recoup costs that they did not include in the original tender process?

John Howison: Are you referring to companies that are given a two-year extension?

Michael McMahon: Will those companies be treated in the same way as companies that come fresh to the tendering process?

John Howison: You would need to address that question to BEAR Scotland and Amey, for example, which could answer it from their experience.

Michael McMahon: If you are setting specifications and asking companies to tender on the basis of best value rather than lowest cost—in the answers that you gave to Fergus Ewing, you assured us that that was the case—surely you should have taken into consideration the costs that will arise from extending contracts.

Nicol Stephen: You are arguing that the current operating companies could be at a disadvantage or an advantage, depending on whether the two-year extension period is triggered and whether they make a profit from that.

Michael McMahon: I wonder whether consideration has been given to whether the current operators will be at a disadvantage.

Nicol Stephen: Often the argument for an extension is that the Executive gets the option to continue the contract at an agreed price. If the option is structured in that way, we can trigger the price regardless of whether it is in the best interests of the contractor, which is bound to deliver the service for the remaining period. Are you suggesting that triggering it in a way that disadvantaged BEAR or Amey could have an impact on their ability to retender?

Michael McMahon: Yes. I wondered whether that issue had been considered. One problem at the outset of the 2G contracts was that those who had the contracts were put at a disadvantage. I hope that at the start of the 3G contracts we will not find ourselves in a situation where operators are tendering at the lowest cost and minimising costs unrealistically, in order to get the contracts. The companies that currently hold the contracts, which appear by all accounts to have worked to a reasonable standard and to have achieved what

was asked of them, could now find themselves disadvantaged.

Nicol Stephen: We would never proceed with a contract on the basis that you suggest. We would never go to tender in a situation in which we believed that, through actions of the Executive, one or other tenderer would be disadvantaged.

Michael McMahon: Exactly that criticism was made when we moved from the first generation to the second generation of contracts. It was argued that the incumbent local authority bidders were disadvantaged. I hope that similar accusations will not be made as we move from 2G to 3G.

John Howison: We have discussed the situation with BEAR and Amey in general terms and they are aware of what we are doing. It has not been suggested that our strategy has impacted on their viability in any way.

At the start of the 1G contracts process, we thought that the opposite of what Michael McMahon described would be the case. We thought that the holders of contracts would enter the competition with a significant advantage because they had already invested in plant and depots and were aware of the situation. In practice, that turned out not to be the case, but it was thought in the beginning that contract holders would be at an advantage rather than a disadvantage in competing with new bidders.

17:15

Michael McMahon: With respect, the committee received correspondence from a range of local authorities that formed part of consortiums that tendered for the 2G contracts. They had tendered at what they considered to be realistic prices, based on the fact that they were the incumbents, but they thought that they had been disadvantaged because the specifications in the tender allowed companies to enter the competition and undercut them with unrealistic bids. I hope that the same accusations will not be made in relation to the 3G contracts.

John Howison: A common specification applied to everybody. There absolutely was a level playing field.

Michael McMahon: I accept that there was a common specification, but the local authorities that bid for the 2G contracts did not think that that specification could be met, so they bid on the basis of what they considered to be realistic prices. Local authorities felt disadvantaged by the process, which is why they went to court. As we move from the 2G contracts to the 3G contracts, I seek reassurance that everything has been taken into consideration to prevent a similar situation from arising.

Nicol Stephen: It is fair to say that, as we move from second-generation to third-generation contracts, we are unaware of anything that would trigger the same controversy and unhappiness as was generated at the time to which you refer. If the committee has received evidence in that regard from BEAR Scotland and Amey, I would be interested to hear about it and I hope that my officials can respond to it, because our intention is only to ensure that there is an open, fair competition and a level playing field for all.

Jim Barton: I think that I understand Michael McMahon's position and I will identify two matters that might be relevant to the discussion. First, you asked whether the operating companies will be disadvantaged if they want to carry on for more years. There is a price-fluctuation formula in the contract: because prices cannot be held from year 1 to year 7 or year 8, an adjustment allows that facility. The formula does not cover matters such as plant wearing out, but frankly I think that that is a marginal issue.

Secondly, we are creating a level playing field. In the information that we have about our network and operations we are far better placed now than we were at the start of the 2G contracts. I heard the discussion about the contract management and quality systems. We have a lot of information about what we will require of new companies that become involved, which creates a level playing field. The requirements apply right through from operations on the ground to management systems and cover matters such as the number of meetings that must be attended. The requirements are in place because we want contracts to be properly priced, not underpriced.

Margaret Smith: I asked earlier about management systems and picked up on a comment in the performance audit group's 2003-04 report, which said:

"The largest area of concern on BEAR and Amey's performance was in the application of some of their management systems."

What changes will you introduce in the new contract that will improve the performance of key management systems?

Jim Barton: As previous witnesses said, the management systems that we brought in are as advanced as any that operate in the United Kingdom. They provide a level of control and information that was hitherto unseen. There is no doubt that there were difficulties in introducing those innovative systems, but our information suggests that we influenced the market in doing so, so that the market is now much better placed to provide those systems. John Gooday might add to that. We are in discussions about whether we should require operating companies to use a specific system—that has advantages, but it also

has disadvantages—or allow them to purchase a system of their choice. The difference between where we are now and where we were in 2001 is that the products are now on the market.

Margaret Smith: I will pick up on a few points that have been made in correspondence from a number of local authorities and in the evidence that we took from SCOTS. Issues arise continually about the interface between the trunk road and local road networks. A number of people have said that there needs to be greater clarification of where the trunk road network begins and ends. They have specific concerns about the fact that there is not a level playing field in lighting specifications. In parts of urban Dundee there is an extensive trunk road network where, if there is a problem, people can be left without good lighting for up to 28 days, whereas for local roads they would have to wait only a handful of days. Will you introduce changes covering lighting and clear boundary lines between the trunk road and local road networks?

Jim Barton: You are right that there are two separate issues. We have been engaging with SCOTS for two or three years on the extent of the network, what we own and what local authorities own. We have produced drawings that determine generically what we believe we own, which are now with SCOTS for consideration. If we can agree the generic layout for the boundary between what we own and what local authorities own, we can engage with individual authorities so that they can tell us where things are different. That has taken us a long time. In the interim, we have instructed the operating companies that where there is any dubiety about what we own and what local authorities own, the operating companies will maintain the roads. We do not want such dubiety. On lighting, we acknowledge the problem and are changing the specifications.

Margaret Smith: That is good news and comes as a direct result of the lobbying that we have been hearing about from local authorities and SCOTS. There is a general issue to do with community involvement and the community planning systems. We have heard examples of where people are frustrated in getting hold of the people to whom they should be speaking about particular issues, because they have assumed that the council is responsible but find that the operating companies are responsible. Will you introduce new parts of the contract to tighten up on the need for the successful companies to consult more and to involve the community more?

Nicol Stephen: That is one of the areas that I have been anxious to ensure is addressed. The issue is not simply to do with community involvement, although it is important that BEAR and Amey staff engage fully with communities. It is

important that we cover that issue in the third-generation contracts. I also want to see improvements in how correspondence and e-mail complaints are handled. I want to see improvements to the website information about the operating company contracts. All that is an area in which we have been learning over the past few years and in which significant improvements can be made. I also think that it is an area in which expectations are increasing; people want to ensure that if there is a concern or a complaint, we get to the heart of the problem and give a full and meaningful response. On all those issues it is important that there is the right engagement at the right level from the operating companies and we will consider them all in the new contracts.

Jim Barton: The operating companies have made strenuous efforts to engage with communities throughout Scotland and my staff have done likewise. I did not recognise comments from SCOTS about Scottish Executive staff demurring from attending meetings, but if there are specific instances in which Executive staff are not engaging with the community, I am happy to take those on board—if they are passed to me, I will deal with them. We seek actively to engage with the community, and we are talking to SCOTS about what community planning means with regard to trunk road operations. John Howison has prepared a paper for SCOTS that tries to understand what our engagement should be. It is for us to understand that engagement before we transfer that requirement to the operating companies, or indeed to our own staff.

Margaret Smith: How will the introduction of RTPs impact on the operation of the contracts?

Nicol Stephen: Initially there will be no direct consequence, because the RTPs will not have responsibility for the trunk roads or their maintenance. However, the RTPs may develop over time and, in the right circumstances and at the right time, we would be prepared to consider transferring responsibilities to the RTPs. If the right proposal were made, we would consider such a transfer seriously. This is an area where there could be developments in future, although they are unlikely to affect the current round of contracts.

The Convener: You will have heard Tom Walker of the Scottish Borders Council saying that some trunk roads might be better managed by the regional transport partnership. Equally, there are people who make the case that some local roads should be regarded as trunk roads. Will the contracts have the flexibility to allow adjustments of that nature?

Nicol Stephen: I hope so. The most recent trunk roads review was in 1996. It is important that we anticipate that there could be changes during the next generation of contracts. Such issues

deserve to be considered reasonably regularly. I would have thought that, after ten years, we should be carrying out the sort of review that you suggest. The creation of the RTPs creates a new dimension to all of this. It is important that we do not carry out a review at an unfortunate time and that the RTPs have the opportunity to become established first. If we carried out a review just as the RTPs were coming into operation, we might be frustrated and think that we had done so a year too early and had not given the partnerships the chance to find their feet and to make constructive proposals. We recognise the arguments relating to certain parts of the trunk road network and the fact that there are still parts of that network that are single-track roads. It is important that we are flexible and not prescriptive, and that that flexibility is built into the contracts, in the same way as we can vary the ScotRail franchise, for example, if new services are introduced. There could be cost consequences, but we want to allow for that.

Paul Martin: Would you advocate going ahead with a procurement process even when there is insufficient information for the bidders?

Nicol Stephen: If there was insufficient information for bidders to come to a view on tendering for a contract, I would hope that those bidders would make their concerns known to us. We would then be in a position to respond to those concerns and to give additional information fairly to all bidders. Clearly, if one bidder has raised a concern with us, it is appropriate that we provide any additional information to all the bidders so that the level playing field remains.

Paul Martin: The Auditor General has highlighted the fact that, during the bidding for a multimillion pound contract, bidders had insufficient information. Is it acceptable that we proceeded with the process despite all the concerns that had arisen?

17:30

Nicol Stephen: It is in everyone's interest that there is sufficient, good-quality, reliable information. Bidders have to be able to come to a view on an appropriate tender price; it is in no one's interest that a contract should fall over or run into difficulties because of poor-quality information. With the third-generation contracts, we are striving to learn from problems with bids in the past.

Paul Martin: The point is that we proceeded with a process when it was clear that bidders had insufficient information. Could we not have extended the contracts with local authorities to allow time for more information to be provided to the bidders?

Nicol Stephen: Again, we are looking backwards. I hope that the sort of situation that

Paul Martin describes will not recur. We now have considerably better information and have learned many lessons from the previous generation of contracts. The people sitting beside me have experience and may want to contribute.

Jim Barton: Yes.

John Gooday: Yes.

John Howison: May I—

Nicol Stephen: They all want to contribute.

The Convener: But not for too long, as we still have a lot of business to get through.

John Howison: Clearly, there were difficulties—we accept that. It was not for the lack of trying that the information was not available. In fact, we appointed a consultant and sent him out six months ahead of the tendering process to try to get the information. Regrettably, the previous contractors had not been documenting what they were up to and did not have an inventory of the road network. The information that we had was deficient. However, we had to go ahead with the contract. The result was that the tenderers had to do their own due diligence.

The fact that we managed to award the contracts suggests that, although things were far from ideal, we were not unsuccessful ultimately. However, the lesson was learned, to the extent that there has been much more of a focus on maintaining information in the second-generation contracts. Contractors have populated the inventories so that we know what is out there on—

Paul Martin: Sorry, Mr Howison, but I want you to clarify this point, although I appreciate that you want to raise other issues too.

The Scottish Executive proceeded with this contract despite the fact that bidders had said that they had insufficient information. Was that a professional approach—for a Scottish Executive department to go ahead with a multimillion pound bidding process when people did not have sufficient information? Did that ensure that we got value for money?

Jim Barton: I want to repeat something that the minister said in his opening remarks. The concluding comment of the Auditor General in the report was:

“Overall the Department implemented these large and important contract competitions fairly, properly and with due regard to value for money.”

We have learned lessons, but what the Auditor General said is the bottom line.

Paul Martin: But—

The Convener: Paul, we have a lot of other business.

Paul Martin: I appreciate that, but I want to raise one final point. I was going to raise another issue, but I appreciate that we are stuck for time.

I accept that that was the Auditor General's overall conclusion, but can we state clearly that, during the process, the department received representations from bidders who were concerned that they had insufficient information to allow them to work on their bids? We proceeded with the tendering process, but can you confirm that we could have extended the contracts that were in place with the local authorities and allowed more time to extract more information? Is that correct or not?

John Howison: If we had extended the contracts, we would have paid very much more for the services—£15 million extra per year.

Paul Martin: I appreciate that, but that is not the point. I am sorry to labour the point, convener. Did we have the option to extend the local authorities' existing contracts to allow us to get more effective information? Could bids have come in that would have been lower than the ones that succeeded?

John Howison: Technically, no, as we would then have breached European Community procurement requirements.

Paul Martin: What would we have done if we had not got the information? Would we have gone ahead with the process, despite the lack of information?

John Howison: We proceeded based on the information that was available to us.

Paul Martin: So it is an EC requirement to deliver the contract within six months.

John Howison: Yes. Having ascertained that there was no way in which we could get additional or better information for the contract, we proceeded with it and awarded it.

Nicol Stephen: I repeat that we do not want the situation to arise again. We believe that information is available to enable us to conduct a solid tendering process for the third-generation contracts. However, if the tenderers have concerns, I will want to know about them and to be able to respond to them before the tenders are submitted. I will want to do so in a way that is fair to all tenderers. Any additional information that is requested will be made available to everyone concerned as quickly as possible within the timescale. If people are aware of information problems now or such problems become apparent in this round of contracts, we want to know about them so that we can remedy them.

Paul Martin: Can Mr Howison provide information on the EC requirement that contracts be delivered within a six-month period, which

prevented an extension from being given to local authorities? Can he confirm in writing the legislation from which that requirement arises?

The Convener: I ask the minister to provide us with a letter on that issue, rather than responding now.

I have two final points. I do not want the minister to answer my first question now, because it does not relate specifically to the contracts, but I ask him to respond in writing. The current contractors indicated in evidence that, in their experience, there is still what they describe as a mad March, during which there is a huge increase in the number of Scottish Executive contracts that are awarded for roads maintenance, because the Enterprise, Transport and Lifelong Learning Department is trying to spend its budget. The contractors highlighted the fact that that is not the most efficient way of going about roads procurement. Given that there is no requirement for the Executive as a whole to spend all its budget in the calendar year and that it has the opportunity to carry forward underspends, the approach that has been described does not seem to be an appropriate use of public money. I would be grateful if the minister would supply us in writing with a profile of award and delivery of contracts, to indicate whether the contractors' observation is accurate.

I would also appreciate a response to my second question. The PAG report identified that works contracts of between £150,000 and £3 million are awarded in addition to the core contracts. I understand that, by and large, those works are not carried out by Amey or BEAR. In total, they accounted for £32 million or 26 per cent of the total work that was done on the trunk roads in the most recent year. Either now or subsequently, can you indicate how the figures compare with those for the first generation of contracts? Are they higher or lower? Would it be worth considering having a higher threshold, so that more of the works contracts can be delivered as part of the next generation of trunk road contracts?

Jim Barton: The average percentage over the course of the current contracts is 39 per cent. The average in the previous round of contracts was 38 per cent. The figures have changed, but the percentages are roughly the same. We are considering the threshold values of £150,000 and £3 million.

The Convener: That is very useful.

Nicol Stephen: I will respond in writing to Paul Martin's final question and to the convener's point about year-end spending.

The Convener: I thank the minister for that. He is not leaving us before the next agenda item, but the three Executive officials who have supported him for this item are, so I thank them for attending.

Ferry Services (Clyde and Hebrides)

17:41

The Convener: The fifth agenda item is consideration of tendering for ferry services in the Clyde and Hebrides. I ask members, the minister and officials to make their questions and answers as concise as possible, because the committee has two further agenda items and it is already past 5.40 pm. We do not wish to breach our previous record of continuing until 9.40 pm, so I ask everyone to concentrate on the issues at hand.

The tendering of ferry services is of great import and is the subject of considerable debate in political circles, in communities and among the staff who deliver the services. The recent announcement of proposed industrial action highlights how important it is for the Parliament and the committee to resolve the matter effectively.

The minister will make introductory remarks, after which we will have questions and answers.

Nicol Stephen: As members are all aware, following the parliamentary debate on ferry services last December, I agreed to raise the Parliament's concerns with the European Commission. I met the European transport commissioner, M Barrot, in December. Discussions with the Commission continue and we are pressing hard to find out whether any alternatives to tendering would comply with European Union rules. We continue to explore every possibility. No tendering will take place until we have concluded our discussions with the Commission and until I have reported to Parliament.

My priority is to protect the lifeline Clyde and Hebrides ferry services and to ensure that they continue to serve the remote and island communities that depend heavily on them. That is why I simply cannot understand strike action in such circumstances, as the only damage will be to the people and the communities that depend on those lifeline ferry services.

The Convener: I am aware that you were in Brussels a day or two after the parliamentary debate and that you met the commissioner. Since then, what further discussions have taken place directly between you and the commissioner, between members of the UK Government and the commissioner or between officials of either Government and the commissioner?

Nicol Stephen: I have exchanged correspondence with the commissioner, but I have

not had a further meeting with him. Discussions at official level have taken place.

We have spent a considerable amount of time on reviewing the detailed legal advice. As members know, the issue is not new. It has been considered by the Parliament and by ministers for the past five years. However, I thought that it was important to update the legal advice and to ensure that we considered all the options in our discussions with the Commission. I expect further meetings to take place at official level before the end of March, after which I expect further discussions to take place at ministerial and commissioner level in the following month. That is the timetable to which we are working.

More than one member of the Scottish Parliament has impressed on me the importance of getting the matter right and ensuring that we investigate every possible alternative to tendering. If that means that the timetable might slip, I think that MSPs would prefer us to take the time fully to investigate the issues rather than force an early decision. I want to work to the timetable that I set out, which is reasonable, following the debate in Parliament, but my emphasis throughout the process will be on ensuring that there is a thorough investigation of the alternatives to tendering and that we receive the best legal advice, so that as we enter into negotiations with the Commission we are trying as hard as possible to protect the lifeline ferry services and to find an effective alternative to tendering.

17:45

The Convener: You answered my question about the interaction between the Executive and the Commission. However, the EU works largely through the member state, which in our case is the UK. I imagine that the Department of Trade and Industry and the Department for Transport have an interest in the matter: what engagement has there been with those departments to ensure that the case is investigated from all angles?

Nicol Stephen: There has been engagement with the Department for Transport at official and ministerial levels. I am not sure whether there has been engagement with the DTI at official level—perhaps officials can comment on that—but there has been no engagement with the DTI at ministerial level. We have also been dealing with the United Kingdom permanent representation to the European Union, to ensure that it is kept informed, and we have been dealing with the Commission through UKRep in the normal way. From a UK and Scottish perspective, everyone has been kept fully informed and that will continue.

David Hart (Scottish Executive Enterprise, Transport and Lifelong Learning Department):

The DTI is certainly in our circle of consultees on the exercise. It is fair to say that although the DTI is the lead department in the UK Government on state aid issues, the department does not regard itself as the expert on maritime cabotage rules—I think that the DTI would expect the Department for Transport to take the lead on such matters. We were in close contact with the Department for Transport before the vote in Parliament and we have had more specific contact since then.

The Convener: I welcome two members who have a constituency interest in the matter: Alasdair Morrison, who is the MSP for the Western Isles; and George Lyon, who is the MSP for Argyll and Bute. For the record, I note that Jamie McGrigor was here earlier—I assume that he had to leave to attend to other business. I am sure that the two members who have joined us will participate in the committee's questioning of the minister.

Fergus Ewing: The minister said that the Scottish Executive is engaging with Westminster. How can the minister's stated desire to find an alternative to competitive tendering be reconciled with the comments of Charlotte Atkins, Parliamentary Under-Secretary of State in the UK Government Department for Transport? She said that we must accept that services

"have to be subject to a competitive tender."—[*Official Report, House of Commons*, 2 March 2005; Vol 431, c 320.]

Nicol Stephen: It is important to emphasise that responsibility for the matter lies with the Scottish Executive. I take very seriously my undertaking fully to investigate alternatives to tendering, which I repeated today, as do the officials who are accompanying me. We intend to conclude our discussions with the Commission and to report to Parliament the outcome of those discussions as soon as we can.

Fergus Ewing: I certainly support that approach, although it appears that Westminster has ruled it out. I will move on.

A great deal of work has been done by academics, mostly pro bono I believe, to find a solution or an alternative to tendering. Professor Neil Kay has put forward a proposal, which I believe merits careful consideration. Paul Bennett and Jeanette Findlay have also done a great deal of work. I want to elicit factual responses about the consequences of tendering going ahead. What is the Scottish Executive's estimate, in units of millions of pounds, of the extra costs over and above the status quo if a company other than Caledonian MacBrayne were to win the tender?

Nicol Stephen: At the start of our discussions, the convener urged us to keep our contributions

short. I can be brief in my response to questions that anticipate tendering. At the moment, I am putting all my efforts into seeing whether tendering can be avoided. I believe that that will require a great deal of hard work involving ministers and Executive officials and will draw on the good work that has been done by academics to test the alternatives as fully as possible. At this stage, therefore, it is not sensible to consider issues associated with proceeding with the tender. Parliament has asked that we consider again avoiding the tender, so that is what my efforts are going into in the coming weeks.

Fergus Ewing: I agree entirely with the sentiment, but I suggest that one way of avoiding the tender would be by pointing out—not least to the European Commission and to Charlotte Atkins and her boss, Alistair Darling—what the extra costs would be if tendering were to proceed. That would demonstrate clearly that the exercise would involve extra costs, rather than lesser costs. It has been put to us clearly—and, as far as I know, this is not being denied in many quarters—that if CalMac loses the tender, or even if it wins, having been split into an operations company, an unavoidable cost will be that of winding up or closing the pension fund, which is estimated at £10 million. Do you accept that estimate? Is it in the broad range of figures that you believe to be correct?

Nicol Stephen: We could take arguments to the Commission based on cost. That is a fair point to make, but all the advice that I have received is that cost arguments are not likely to be persuasive. If we are to avoid tendering, it will be on the basis of successful legal argument. The requirement to tender is based on the laws of the European Union, such as the maritime cabotage regulation of 1992. It is issues of state aid that will or will not win the argument for us. It is wrong to raise false hopes, but that is the argument on which Professor Kay and Professor Bennett have focused. They have not put forward alternative options on cost grounds.

The Convener: I appreciate that we have time constraints, but if members have tightly worded questions on the specification of the tender, it might be appropriate to take them tonight. Given that the consultation closes this week, this might be the best opportunity for members to record concerns that they have about the Executive proceeding with tendering. I am quite happy for members to ask questions of that nature, but they should try to keep them tightly worded.

Fergus Ewing: I am grateful for that.

The figure of £30 million has been mentioned as the possible extra cost of going to tender in some scenarios. I would be surprised if the minister is saying that such a huge extra cost, compared with

the annual subsidy of £21 million, would be considered by anybody to be irrelevant; it certainly would not be considered irrelevant by the taxpayer or the general public. However, if that is the minister's approach, that is the minister's approach.

I will move on, as the convener asked. Is it not the case that the European Commission does not require the division of CalMac into two separate companies?

David Hart: I think that that is correct. The separation was proposed to ensure that the publicly owned fleet in CalMac's services would remain in public ownership and therefore be available not only for the first contract that was envisaged, but for the second and third ones as well. That was important given the long-term nature of investment in ships.

The Commission was interested in having a level playing field for all the different bidders. CalMac has a fleet of vessels that has been fairly expensively acquired. Until very recently, the fleet was acquired predominantly through a grant system rather than through a loan system. In effect, a lot of public subsidy is wrapped up in the fleet. I find it difficult to imagine that the Commission would be comfortable with a tendering process that allowed one operator to bid on the basis of a fleet, the acquisition of which had been heavily subsidised, while other bidders had to acquire their own fleets.

Subsidiary issues arise as well. For example, what would happen were CalMac to lose the tender? If other bidders arrived with their own vessels, there would be—based on the cost of replacements—more than £220 million-worth of vessels for which there was no obvious use. Another consideration is that the CalMac fleet has been purpose built for the routes that it serves. Virtually all CalMac's routes have specific draught requirements. The approaches are often very shallow and conventional ferries cannot use them.

All those considerations point to the sense of having a way of keeping the vessels in public ownership and securing their long-term future, and a way of allowing us to use a fleet that has been purpose built for the routes.

Fergus Ewing: I am glad that you said that the European Commission does not, and did not, require the division of CalMac into two units. Do you accept that the tax liability of doing that would involve an extra £5 million to £10 million?

David Hart: I understand that there will be an up-front tax liability but that it will be clawed back over time through the system of capital allowances.

The Convener: I would like to bring in other committee members. Please ask just one more question.

Fergus Ewing: Very well.

Paragraph 1.36 of the draft invitation to tender says:

"VesCo will also be responsible for providing an operator of last resort function".

Who will that be? How much will it cost? Will it be possible to fulfil that function?

David Hart: We have said in the documentation that an early task for the vessel-owning company—which would be created before the tendering process, although, as the minister said, that is not necessarily the route that we will follow—would be to devise the specific method of delivering operator-of-last-resort systems. The obvious model, which is available, would be to procure such an arrangement—

Fergus Ewing: From whom? Which companies could be operators of last resort? How much would it cost?

David Hart: I suspect that it would be done through a tendering procedure, if that were the outcome for the main contract. It would cost, obviously, what the tendering process said it would cost.

Fergus Ewing: But the procedure would have to be put in place before the contract. You are suggesting that there will be a tendering procedure to determine operator of last resort before the tendering procedure for the CalMac routes.

David Hart: The procedure has to be in place before the main contract is implemented, if that is the route that we take. However, there will be a significant gap between identification of the successful bidder and implementation of the contract. There would be time in that period—

Fergus Ewing: How much would it cost?

David Hart: As I said, that would depend on the market. There is no obvious reason why a tendering process should result in a significantly higher cost. There would be an extra cost.

Fergus Ewing: Would that cost be more than £1 million, £2 million, £3 million, £5 million or £10 million? Will you give us a clue? The taxpayer will have to pick up the tab.

David Hart: I will not speculate on figures. That would be inappropriate.

Fergus Ewing: Taxpayers' money is involved. Should we not have an answer about what the cost will be, minister?

David Hart: Answers will be available in due course, but there is no need for an answer at this stage.

18:00

The Convener: I will call other members to speak. If we have time at the end, I will call Fergus Ewing again.

Tommy Sheridan: Who in the minister's department has evaluated the academic papers that have been referred to—the papers by Neil Kay, Paul Bennett and Jeanette Findlay? When will reports of that evaluation be available?

Nicol Stephen: Some of those papers have only just become available to us. The principal advice that I receive about all the suggested alternatives to tendering—some were generated in the department, some were suggested in previous years and some are in the more recent studies to which Tommy Sheridan refers—is from Scottish Executive solicitors. Jim Logie has the greatest expertise in the matter.

Tommy Sheridan: The papers by two of the individuals to whom I referred—Neil Kay and Paul Bennett—have been available for several months. Updated versions were made available for last Friday's seminar, to which I believe you were invited. As you know, Jeanette Findlay's paper became available only last week. The papers could have been evaluated by now. Who is evaluating them? Is Jim Logie doing that? What is the timescale?

Nicol Stephen: As recently as this afternoon, Mr Logie advised me on some of the issues. The papers are being evaluated. We have ensured that the best-quality legal advice is available to the Executive on all the issues and we will take forward the arguments to the Commission. The individuals who have presented their thoughts and recommendations suggest different approaches. That is why it is important that we go to the Commission armed with the best advice.

Tommy Sheridan: I hope that you do not mind if I express my worry about what you say. You talk about going to the Commission with your arguments, but the point of the academic papers is that you should proceed with your alternatives to tendering, not ask the Commission for permission. The papers say that you are asking the referee to judge the rules, rather than playing the process that would be best for the taxpayer in Scotland.

Do you accept that the evidence that Neil Kay gave to the Transport and the Environment Committee back in 2001 about the tendering exercise for the northern isles contract has—unfortunately—proved relevant, given the disastrous collapse of that tender?

Nicol Stephen: There are lessons to learn from the northern isles tender. We could spend another session on discussing all those issues, but for tonight, I will concentrate on the CalMac issues. I understand what Tommy Sheridan suggests, but it is important to discuss the issues with the Commission and to understand clearly the actions that the Commission is likely to take. The reason for that is clear. The absolute priority must be the preservation and maintenance of the lifeline ferry services. That is why I deplore any action that will undermine and lead to damage to those services.

Central to the actions of any responsible Government is knowledge of the Commission's likely reaction to any proposals that we develop. I am determined that we should continue to be able to subsidise the lifeline ferry services. We invest well over £20 million each year in those services and that must continue. The absolute priority is to make it certain that that occurs.

Tommy Sheridan: Yes, but—

The Convener: You may ask one more question before we move on.

Tommy Sheridan: I will try to ask two questions in one. First, does the minister accept that when the process began in 2001 we were told that the tender would be ready by the end of the year? It is now 2005 and there has been no tender, but there has been no collapse and the European Commission has not sent in the troops. We must be careful not to create an artificial climate of fear about the removal of subsidy from the ferry services. Secondly, does the minister accept that the Executive's failure to listen to the good academic advice that it was given in 2001 cost us £13 million, because we had to renegotiate the northern isles contract? Will he assure us that the Executive will not make the same mistake this time?

Nicol Stephen: We want to make certain that we offer the best possible quality lifeline ferry services in the Clyde and Hebrides and I am determined that we do so. It is important that we investigate thoroughly the alternatives to tendering and that we go to the Commission with the best possible arguments. However, the issue is not new. Tommy Sheridan knows that we have been considering the matter for the past five years. George Lyon and Alasdair Morrison can comment on this better than I can, but there was a feeling that we should draw the matter to a conclusion. The issue has been hanging over CalMac and the communities involved for a long time and the view was taken last year that it was important that we bring the process to a close.

I fully accept the outcome of the vote in Parliament in December, which means that it is vital that I go back to the Commission with the

best possible information and advice about alternatives to tendering, to ascertain whether any such alternative would be achievable within EU law. I return to the difficulties of EU law in the area. It was not the Executive's policy decision to go to tendering; we moved forward with proposals but, as Tommy Sheridan pointed out, we did not move quickly and at each stage we considered alternatives and the best way of moving forward if tendering were to be required, for example through the bundling of the main Clyde and Hebrides services. We have had to operate on the basis of EU law as we find it and as we are advised on it, which means that we have had to consider the 1992 maritime cabotage regulation and the state aid rules. We have had to ensure that we act within the law—as an Executive and a Parliament must do.

The Convener: Before I bring in other members, I raise a factual matter. Professor Kay's paper was made available only 10 days ago, rather than several months ago, so it is reasonable that the Executive is still considering the paper. I welcome the minister's commitment fully to consider and evaluate all the suggestions from academics, including those of Professor Kay.

Mr Alasdair Morrison (Western Isles) (Lab): I am not a member of the Local Government and Transport Committee and I am grateful to the convener and members for the opportunity to ask a number of brief questions. With the convener's permission, I make a brief observation, which relates to what the minister said about industrial action. I concur with what the minister said. The development is most regrettable and if strike action goes ahead it will do nothing to protect the jobs or conditions that members of National Union of Rail, Maritime and Transport Workers enjoy or to serve the interests of the people whom I represent.

Tommy Sheridan: Convener, that was the second time that reference has been made to industrial action. I did not think that we were here to discuss that matter.

The Convener: It is perfectly appropriate for the minister to refer to the industrial relations situation, given that it is a material factor in the issue that we are debating. Indeed, it is appropriate that the local MSP should mention the matter, because the community that he represents is heavily dependent on the ferry services. The member was not out of order in that regard.

Tommy Sheridan: We are supposed to be asking the minister questions.

The Convener: With respect, many members include observations in their questions; I am sure that you, too, have done so once or twice.

Mr Morrison: I am grateful to the convener. I will try to bundle together my questions—no pun intended.

I have four questions for the minister. First, does the Executive have to go down the tendering route? Secondly, what is your understanding of the sanctions that are available to the Commission? What measures can it deploy to pull both the Scottish Executive and the UK Government into line? Thirdly, can you share with us any of the experiences that you or your officials have had with the way in which other EU states are dealing with their state-funded ferry services? Lastly, could you expand on an issue that you mentioned in your opening remarks in relation to Government actively seeking ways to avoid tendering? In an ideal world, that is how it would be.

Nicol Stephen: You asked whether we have to go down this route. All the advice that I have been given to date has been that we must do so to comply with the EU rules. I am now moving forward from that advice and considering all the suggestions that have been made—those that have been made over the past few years and those that have been made over the past few months and weeks—to ensure that we have the best chance in arguing with the Commission that tendering could be avoided. I intend to do exactly that: I intend to make the best possible argument in relation to alternatives to tendering.

If we are deemed by the Commission not to be following EU law, it can require us to stop paying aid to CalMac. That would mean, of course, that CalMac would not be in a position to continue to fund the lifeline ferry services. That is a significant threat and it is why most, if not all, EU countries have, as far as we are aware, either tendered their ferry services or are moving towards doing so. Some countries—for example Spain, in relation to Trasméd—have done so under threat of action by the European Commission. The Spanish were required by the Commission to proceed with a tendering process. The issue is not new, and it is not unique to Scotland. Other countries have been forced to face up to it and have been forced to tender by the Commission.

I think that that answers three of your questions. The fourth one—

Mr Morrison: I asked you to expand on your opening remarks. You mentioned how the Government—you and other Scottish ministers—is actively pursuing an agenda of avoidance of the tendering process, although commissioners would not want to hear it being described in that way.

Nicol Stephen: The Commission understands the approach that we have been taking, and it understands that we are working hard to fulfil the

requirements of EU law. In our correspondence with the commissioner, it is indicated that the Commission is content to hold discussions and, if necessary, negotiations with us. The Commission's core requirement is that the law of the European Union is followed. It is helpful that we have some time to achieve that.

The issue was first drawn to our attention by correspondence from the Commission back in 1999. There will come a time when the Commission's patience will wear thin and it will require us to respond on the issues. If it was sensed that we were not acting in good faith, the Commission could initiate infraction proceedings, as happened with Spain. There is no suggestion that that could happen over the next few weeks, while negotiations are proceeding, but it is important that we get the best legal advice on the issues and that we hold discussions with the Commission. It would be quite wrong at this stage to break off discussions with the Commission, because that would signify, in the minds of the commissioners, our intent to move away from EU law. More than likely, that would trigger the sort of infraction proceedings that could be damaging to the lifeline ferry services.

George Lyon (Argyll and Bute) (LD): I thank the convener for giving me the opportunity to put a couple of questions. Can the minister or his officials confirm that an independent ferry company has already registered a complaint with the Commission with regard to unfair competition on one of the routes?

David Hart: I am aware of the case that you mention. We have not had confirmation from the European Commission of such a complaint, but such things tend to take time, so that does not mean that there is not a complaint in the system.

18:15

George Lyon: For the sake of clarity, will the minister explain why we are taking a different approach to the Gourock to Dunoon route? That is a separate issue in some ways, although it is linked with the requirement to address the non-discrimination issues and to comply with EU law.

Nicol Stephen: A company called Western Ferries (Clyde) Ltd operates a profitable ferry service from Gourock to Dunoon, although not on exactly the same route as the CalMac service. We have provided a subsidised service on that route for a considerable period. The CalMac service operates on a restricted basis, but views have been expressed to us by the local community, and indeed by Professor Kay, that it would be possible to operate on an unrestricted basis—in other words, that it would be possible to provide a better

quality of service on the route if the subsidised service was no longer available.

It is proposed that a commercial operator—or, indeed, CalMac if it chose to put forward a proposal—could operate a passenger and vehicle service on a non-subsidised basis for the local community and that, because no subsidy would be involved, it could do so with a better frequency and a higher level of service than CalMac provides. We wanted to test whether that is the case through the normal procedures, which involve a prior information notice, but we have said that until clarification comes from the Commission we will not proceed with the main bundle or with the Gourock to Dunoon issue. There are clear and established differences and the academics who have suggested alternatives that might involve tendering appreciate that the Gourock to Dunoon route stands on its own because it is the only route that involves that form of competition.

George Lyon: My other question is on your promise to examine alternatives. The concession that your predecessor negotiated with the Commission was to ensure that the bundle—all the routes and the integrity of the CalMac service—is at the heart of the proposals. Will you explain the thinking that lay behind the single-bundle principle that was negotiated and will you confirm that it will be very much in your mind in evaluating any alternatives? Communities want to know that you will not be minded to move away from that principle, because it is so important.

Nicol Stephen: It is crucial. Clearly, a significant level of service is provided by CalMac and it is impossible to imagine that that would continue if the bundle was broken down into individual services. For example, CalMac can provide cover if a vessel breaks down. It has to take vessels out of commission each year for repairs and maintenance, but cover can be provided by other vessels so that there is continuity of service. Vessels that are used on summer-only services can be used during the winter to help to support other services, so there is huge advantage in the 20-plus routes being considered together.

If the service was broken up, commercial operators could cherry pick routes or a breakdown on one route could lead to unsuccessful negotiations to try to bring in a vessel from another service, as all operators would operate on a tight basis and would not have additional vessels available. Therefore, there could be difficult situations. Initially, all the routes might be operated by CalMac, but there could be difficulties if another operator came in and wanted to run a particular route.

All those issues must be of concern to ministers and local communities, which is why the Commission's decision to allow the bundling

following the Scottish Executive's lobbying was regarded as a major breakthrough at the time. Some proposed alternatives to tendering would involve a break-up of services. It is important that, in making the argument to the Commission for an alternative to tendering, we suggest a solution that will be acceptable to local communities and that will preserve services and the quality of the service that is currently provided. That will be at the forefront of my mind in all that we do over the next few weeks with the Commission. Preserving the bundle is important.

George Lyon: I have a small point to make. NorthLink was undermined by private competition coming into the route and creaming off revenue by providing a commercial service and one company has intimated that it might be interested in doing that on four or five routes in the CalMac bundle. What can you do to try to ensure that that does not happen under the current proposals? That is a clear weakness that was identified with the NorthLink process. The business case was established on a certain amount of revenue, but revenue was cherry picked by a private operator, which came in and took it away. Have you considered that issue?

Nicol Stephen: All the advice that we have received from CalMac is that the current routes are unprofitable. The subsidy is well over £20 million and has been increasing above the rate of inflation. However, it is clearly up to any commercial operator to decide whether to start to operate a service, which is what happened in the NorthLink situation.

Another factor in the NorthLink situation was that entirely new vessels were brought into operation to replace the existing vessels. That was required for maritime safety reasons—new maritime safety regulations were introduced. Therefore, the problems that developed did not result only from competition.

David Hart might want to add something about the potential for a commercial operator to start to operate a service on the existing routes, but one of the reasons for going for a public service contract approach is to ensure that we provide a subsidy for elements of service. Other operators are then unable to come on to the route. That is an important element of the process of applying a public service contract in such circumstances.

David Hart: We are certainly considering the contract procedures that are in place following the situation in the northern isles that George Lyon described; we want to find out whether we can make the contract's ability to withstand the sort of competition that has been mentioned more robust. The other possible approach is to explore, as we have done to some extent, whether there is any scope for a licensing system that would limit

access to certain routes. That would be a pretty draconian measure, given the presumption that the freedom to operate maritime services would generally be seen as a good thing. However, we are at least investigating the option to see whether there is any scope for a licensing system.

The Convener: I thought that the minister was suggesting that the tender would protect against someone coming in and operating in competition with CalMac, but it is clear from David Hart's answer that the tender would not prevent someone from coming in and competing, although that could be achieved with some sort of licensing scheme. Is my understanding correct?

Nicol Stephen: Yes.

David Hart: We have no powers at present to restrict any operator that wishes to operate any service.

The Convener: A question has been raised with me by individuals who have a strong interest in the matter. Even though the Commission seems to be comfortable with the tendering process, is it correct that there would be no impediment to an individual company challenging the issue about overcompensation with the proposed tendering regime?

David Hart: I am sorry, but I am not sure that I understood what you said.

The Convener: Irrespective of the fact that the Commission has said that it is comfortable with the Executive's position on tendering, if a company believed that a specific route was profitable, would there be anything to impede that company taking a case to court on the question of overcompensation with regard to state aid?

David Hart: It would be dangerous to say that companies could not take issues to court, because they are free to pursue action as they see fit, although whether such action would be successful is debatable. We have to satisfy ourselves in advance of the process that we are not subsidising profitable routes. According to the analysis that we have done on the main bundle of the CalMac routes, all the routes are loss making. That is the basis on which we are setting out. In addition, there will have to be procedures in the contract to claw back excessive profits if that is the outturn. Taking those two points together, I think that it would probably be difficult for someone to argue that we were offering overcompensation for the services.

Nicol Stephen: To clarify, David Hart's answer is perfectly correct—we cannot anticipate the outcome of a court challenge—but the fact that a tendering process will have been gone through will be a strong defence to the challenge. If I misled the committee, I apologise. The point that I was

trying to make was that if, through a tendering process such as the NorthLink process, we end up providing a subsidy for passengers or freight, as we do with the current CalMac services, that support is perfectly proper and legal, because the proper procedures to provide Government support have been gone through. If a competitor finds it difficult to operate or match those prices, that is the result of the appropriate public service contract or public service obligation procedures, as permitted under EU rules. That is the process that is being gone through; we are not talking about a licensing arrangement that would completely block any competitor on the route.

The Convener: I draw the minister's attention to the written question by Catherine Stihler MEP and the answer from Mr Barrot on behalf of the Commission. I will not read out the whole question, but I am sure that the minister is aware of it. The first sentence of the question, which refers to the Community guidelines on state aid to maritime transport, states:

"Although it is considered appropriate for Member States to make maximum use of the above procedures, exceptions may be justified, such as in the case of island cabotage involving regular ferry services."

In his answer, Mr Barrot said that, to date,

"no Member States have ever taken advantage of this exception".

Obviously, he gives a far more complete response than that. However, the Western Isles are in a fairly unique position in comparison with other European island groups. For example, Spain's Balearic islands are far bigger than the Western Isles and have far more air links. Given the unique situation of the Western Isles and the fact that they rely economically and socially on the ferry links, could we not make a strong case to the Commission to accept the exception?

18:30

Nicol Stephen: We have made exactly that argument to the Commission in the past, but it has not responded favourably. As members know, it has made exceptions for ferry services that carry fewer than 100,000 passengers a year—a number of such services in the CalMac bundle fall into that category. However, it has also indicated that, if we were to take that approach, we would have to consider the total cumulative impact of those services.

Members should remember that, if we took such an approach, we would effectively have to accept the need to split the bundle, because we would not be able to do the same with all the routes. After all, some carry significantly more than 100,000 passengers a year. In any case, if we took the approach that you outlined, we would still be

trapped, because we would have to take into consideration the cumulative annual passenger numbers. As a result, according to the advice that we received previously, if passenger numbers on several of the routes came to more than 100,000 and the routes were all awarded to CalMac, we would breach the rules. Again, we will test the options with the Commission and find out whether we can get any movement on the issues.

Our lobbying has achieved changes to the regulations in some areas. For example, because of our representations, we were able to proceed with a bundle and to continue to support mainland-to-mainland routes. We have made some progress over the past five years, but the fundamental issue of tendering remains the most significant area of difficulty.

David Hart: We have seen the quotation that is contained in Catherine Stihler's letter. I should point out that it comes from the now out-of-date 1997 state aid guidelines. More significant, it stops short of the full story, because after stating that

"exceptions may be justified, such as in the case of island cabotage involving regular ferry services",

the guideline in question goes on to say:

"In those instances, measures must be notified and will continue to be assessed under the general State aid rules."

As a result, being granted an exception does not allow someone just to carry on doing whatever they wish. They have to justify themselves under the state aid rules. Any assessment made under the state aid notification procedure will be much more rigorous than simply following the procedures laid down in the guideline; it is not the blanket exception that some people have tried to claim.

I have been following the committee's deliberations and I should point out that not much attention appears to have been given to the communication that the Commission issued on 22 December 2003, a month before the revised state aid guidelines were issued. Although quite a few commentators have picked up on the revised guidelines, they do not seem to have cottoned on to the fact that a relevant communication was issued a few weeks before them. It would be useful if the committee could reflect on that document, because in many ways it is critical to what we are doing.

The Convener: I can confirm that members of the committee have copies of that document, which, in due course, we might well decide to explore with representatives of the Commission.

Mr Jamie McGrigor (Highlands and Islands (Con): I declare an interest, in that I am a constant user of CalMac services in the Hebrides and the

Western Isles and of the excellent Western Ferries service between Gourock and Dunoon.

The minister will be aware that, despite the fact that they might have some gripes over the timetables, the vast majority of people who live in the Western Isles and mainland Argyll and who use the ferry services are blissfully happy that they are served by a company that has as good a safety record and as much experience as CalMac does. Will you try to assuage some of the fears that people have about losing that ferry service? In 18 months, the previous tendering process cost £13.5 million extra on top of the £12 million cost for the northern isles.

Will CalMac be allowed to tender for the northern isles contract? If so, how can it do so on a level playing field if it might lose its whole being as the consequence of another tendering process?

Nicol Stephen: I am aware of the strong support for CalMac in the island communities that it serves, the quality of the service that it provides, the quality of its staff and their dedication and commitment to maintaining the lifeline ferry services. All of my efforts in the next few weeks will be to ensure that we protect the lifeline ferry services and have the opportunity to improve on them.

It is worth pointing out that we are being forced towards tendering—a situation that has been hanging over us for the past five years—because of the 1992 maritime cabotage regulation, which was promoted and signed by John MacGregor, who was the Conservative minister with responsibility for transport at the time. That makes it difficult to take criticism from the Conservatives on this issue.

Mr McGrigor: John MacGregor is not a relative of mine.

Fergus Ewing: All the parties want to find an alternative to the current situation. On 5 January, I wrote to the minister with a series of questions, but I have received no answers, which is disappointing. I will ask one of those questions again just now. The minister has argued that the EU law requires tendering and that the legal advice has been reviewed carefully. Will the minister or any of the five expert advisers who are around the table specify the precise provision in EU law that says that we are required to put the CalMac routes out to tender?

Nicol Stephen: I will allow Jim Logie to answer your question in detail, but I can say that the basic reason relates to article 4.1 of the maritime cabotage regulation of 1992. Although state aid is spoken about a lot in relation to this issue—and it is relevant and important—the main reason relates to public service contracts and obligations and the

responsibility on a member state to proceed with such contracts on a non-discriminatory basis in respect of all ship owners in the European Community. Everything else flows from that.

Fergus Ewing: With respect, the article to which you refer does not specify that tendering is required; nor does any other express provision of EU law. Am I right?

Jim Logie (Scottish Executive Legal and Parliamentary Services): Article 4.1 does not use the word “tender”. As the minister has just pointed out, it requires that public service contracts and obligations operate on a non-discriminatory basis. The question that arises is exactly what a non-discriminatory basis is. The Commission’s answer—which is clear in all its publications, is entirely consistent with its practice in other areas and is supported by judgments from the European Court of Justice—is that the best means of demonstrating that something has operated on a non-discriminatory basis is by having a public tender. If the question is inverted slightly to ask whether Scottish ministers could challenge successfully a decision from the Commission that required them to tender on the basis that article 4.1 does not use the word “tender”, the answer is almost certainly not.

Fergus Ewing: I understand that you have now admitted that there is no express provision in EU law that says that tendering is necessary, but that that is your reading of the import of the law.

The 1997 guidelines on interpreting state aid rules per the maritime cabotage regulation state:

“for public service contracts to be consistent with the common market and not to constitute State aid, the commission expects public tenders to be made”.

Those guidelines have now been scrapped and replaced with the 2004 guidelines, which make no reference to tendering. The later guidelines were produced following the Altmark case, which acknowledged that bus services in Bavaria did not require to be put out to tender.

Is it not the case that, by asking whether we need to go to tender, we are asking the wrong question, because tendering is, after all, simply a mechanism; it is not an objective or principle of EU law. Should not we be asking, as Professor Kay has said, the fundamental question of how we provide an essential lifeline service to vulnerable island communities in the context of a regulatory procurement and tendering regime? If we ask that question, we can find an alternative that does not require competitive tendering, which might be to appoint a regulator, as Professor Kay has argued.

Nicol Stephen: Today is not the day to disagree on these issues or to fall out. Surely today is a day to prepare for our discussions with the Commission and, as I have said, to make the best

argument possible for the avoidance of tendering. The rule is clear. The 1992 regulation states:

"Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners."

The interpretation of the phrase "non-discriminatory basis" lies at the heart of all this.

We will certainly consider the approach that Fergus Ewing is suggesting when we take our arguments to the Commission. I do not know whether Jim Logie wants to add anything to that. We will mount as solid a case as we can. The outcome has to be an alternative that is able to preserve the lifeline ferry services and assure the communities concerned, which is important.

Fergus Ewing: I welcome the spirit of that response, and I just want to pursue the point.

The Convener: Briefly.

Fergus Ewing: This is the final point.

The document of December 2003 to which Mr Hart referred, the communication from the Commission on the interpretation of the maritime cabotage regulation, applying the principle of freedom to provide services to maritime cabotage transport, addresses the principle of non-discrimination at paragraph 5.3.2. It says that the state

"must not set obligations that are tailor-made for a given shipping company".

I put it to the minister that if the tender process were scrapped and a regulator were to apply benchmark objective standards about what routes should cost, what labour should cost and what all aspects of providing a ferry service should cost, that solution would not be tailor-made to any one company. That would be an objective, verifiable standard that could be used, as Professor Kay and others argue, as the kernel around which to put forward an alternative proposal and avoid the £30 million or more price tag of tendering.

18:45

Nicol Stephen: We will consider those issues. I understand the positive points that you make, but potential negatives must also be assessed. The approach that you refer to would mean unbundling and would mean that a route-by-route approach would be taken. The issue could then arise of more than one company expressing an interest in a particular route. How would we resolve a situation in which more than one company expresses interest in a route under a regulatory regime? The answer that we would seem to come back to is tendering.

Each of the alternatives needs to be carefully thought through. It would be wrong of me to go into too much detail about any of them this afternoon, because in a sense that discloses our arguments to the Commission before we reach that stage. We need to go into the discussions with the Commission with the best information and advice possible in order to try to reach a satisfactory outcome. We have started that engagement. We have had discussions with the Commission and we believe that new approaches and new issues can sensibly be taken to it. I do not want to be anything other than realistic with the committee this afternoon, but I am determined to make the best case possible.

The Convener: Tommy Sheridan and George Lyon have two brief points—if they are not brief points I will cut them off.

Tommy Sheridan: Like Fergus Ewing, I welcome at least the minister's spirit today, which is much more positive than his public pronouncements have been before. There is now a desire to avoid tendering rather than acceptance of the inevitability of tendering. I ask him, for the record, to assure us that there will be a ministerial assessment of the academic papers that have been mentioned. All of them are persuasive and all of them point to a huge potential waste of public money—not to mention the disruption to lifeline services to communities—if we go ahead with the tendering exercise. Will the minister please give me an assurance that, within a timescale, evaluations of the documents will be publicly available so that the committee can read them?

The Convener: Before I invite the minister to answer, I will allow George Lyon to ask his final brief question.

George Lyon: As I have had the advantage of reading Neil Kay's proposals in depth, I draw the minister's attention to page 32, where he addresses the issue of non-discrimination. He says that the crux of the state aid question is the 1992 regulation, which, as he notes

"still is the rule of law here".

He goes on to say that one possible way of satisfying the non-discrimination aspect of the regulation would be to inform

"community shipowners that they are welcome to submit technical proposals and alternatives if they wish".

That seems to me to describe a tendering process. The minister should draw attention to that comment when he does the evaluation.

Nicol Stephen: I genuinely do not want to get into the detail of the individual representations this afternoon. I mentioned to Fergus Ewing some of the potential issues that could arise if we go in the direction of the independent regulator that

Professor Kay has suggested. George Lyon rightly draws attention to the point that if there is commercial interest from operators in a particular route, the question is how we resolve that. The answer would seem to draw us back into tendering.

However, I give a guarantee to Tommy Sheridan that there will be a full ministerial assessment of the different options and a full evaluation will be carried out. If they are willing, we will make contact with the individuals who obviously have worked so hard on these complicated issues over the past weeks and months. We will try to get clarification from them where that is important.

I do not guarantee to make all that information publicly available ahead of concluding our current discussions with the Commission. Once they are concluded, I might reconsider that, but I can see only disadvantage in making available our assessments in the likelihood of the Commission accepting our arguments and our reaching a successful outcome. That could undermine our negotiating position with the Commission and I do not want to do that.

The Convener: That brings us to the end of evidence taking. I tell Tommy Sheridan that I would prefer us to deal with the other items of business now. We will have a further opportunity to decide on a way forward in subsequent meetings. I thank the minister and his officials.

Tommy Sheridan: I asked before about the idea of inviting academics to give evidence to the committee and you said, rightly at the time, that it would be very short notice to do so. At least one of the academics has now made it plain that they are willing to give evidence. Can we take that forward?

The Convener: Rather than make a decision on that here, I would prefer to include it on the agenda of a subsequent meeting when we can discuss what further work we feel it is necessary to undertake on the ferry situation. We might well debate then whether we want to call the academics or, indeed, other potential witnesses. I agree to have such an agenda item at a subsequent meeting.

I see that Fergus Ewing wants to comment, but I would prefer to move on because we can deal with such matters at a subsequent meeting.

Trunk Road Maintenance Contracts

18:52

The Convener: I had hoped under this item to identify issues that we raised with the minister during today's evidence but, following clarification of the timeframes, it is clear that we have time to wait until next week to finalise doing that. I suggest to members, particularly to the reporters, that it would be useful to defer doing so, as that would give us an opportunity to reflect on the evidence that we have received today. However, I ask members to indicate by e-mail issues that they want to draw out in any letter that we send to the Executive on the trunk road contracts. The clerks might be able to provide an initial draft of a submission from the committee to the Executive, which we could discuss as an agenda item at next week's meeting and supplement. Are members content with that approach?

Fergus Ewing: Ordinarily I would be, but I have a constituency engagement next Tuesday, so I am unable to be here. That is the way the cookie crumbles. I thought that the response to the winter maintenance point that I raised was encouraging and I hope that the committee will welcome the statements from the minister today that the specification will be increased and make that view known to the minister. Perhaps members will recommend that the minister informs the committee once the tender specification is provisionally set so that we can have another look at it to see how some of the difficult matters of definition and the precise wording of the contract are resolved before they are enshrined in the tender documentation. I am sorry to concentrate on that one aspect, which I raised today; I am conscious that members raised many other aspects, but if it served no other purpose, the inquiry was useful in ventilating that point, which is of great concern to many people throughout Scotland, in particular those in the areas of most severe weather, such as the Highlands.

The Convener: Absolutely. I am sure that whatever we submit to the Executive will reflect the importance of winter maintenance. I take it from the way in which members were questioning the minister that they agree that the development was welcome. If Fergus Ewing has any other observations, he should put them to the clerks and we will ensure that they are discussed next week. If they are sensible and forward-looking suggestions, they will be taken on board.

18:55

Meeting continued in private until 18:59.

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