



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

### FINANCE COMMITTEE

Tuesday 12 January 2010

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**Tuesday 12 January 2010**

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**FINANCE COMMITTEE**

**1<sup>st</sup> Meeting 2010, Session 3**

**CONVENER**

\*Andrew Welsh (Angus) (SNP)

**DEPUTY CONVENER**

\*Tom McCabe (Hamilton South) (Lab)

**COMMITTEE MEMBERS**

\*Derek Brownlee (South of Scotland) (Con)  
\*Malcolm Chisholm (Edinburgh North and Leith) (Lab)  
\*Linda Fabiani (Central Scotland) (SNP)  
\*Joe FitzPatrick (Dundee West) (SNP)  
\*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)  
\*David Whitton (Strathkelvin and Bearsden) (Lab)

**COMMITTEE SUBSTITUTES**

Gavin Brown (Lothians) (Con)  
Lewis Macdonald (Aberdeen Central) (Lab)  
Stewart Maxwell (West of Scotland) (SNP)  
Liam McArthur (Orkney) (LD)

\*attended

**THE FOLLOWING GAVE EVIDENCE:**

Iain Moore (Scottish Government Procurement Directorate)  
John Williams (Scottish Government Finance Directorate)

**CLERK TO THE COMMITTEE**

James Johnston (Clerk)

**SENIOR ASSISTANT CLERK**

Terry Shevlin

**ASSISTANT CLERK**

Allan Campbell

**LOCATION**

Committee Room 2



## Scottish Parliament

### Finance Committee

*Tuesday 12 January 2010*

[The Convener *opened the meeting at 14:02*]

### Decision on Taking Business in Private

**The Convener (Andrew Welsh):** I wish everyone a good new year and welcome everyone to the first meeting of the Finance Committee in 2010 in the third session of the Scottish Parliament. I welcome Terry Shevlin as the new senior assistant clerk to the committee. I ask all members and members of the public to turn off mobile phones and pagers.

Agenda item 1 is to decide whether to consider in private item 5, which concerns our work programme. I propose that we do so. Are members agreed?

**Members** *indicated agreement.*

## Subordinate Legislation

### Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 (SSI 2009/428)

14:03

**The Convener:** Item 2 is consideration of a Scottish statutory instrument that is subject to the negative procedure. We considered related regulations previously and, given the instrument's complexity and the issues that the Subordinate Legislation Committee raised, it was thought useful to invite Scottish Government officials to our meeting to answer members' questions.

I welcome to the committee Jessie Laurie and Iain Moore from the procurement policy branch; and John Williams from the finance co-ordination team. I invite them to make a short opening statement if they wish.

**Iain Moore (Scottish Government Procurement Directorate):** I will make a short statement outlining the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009. The regulations implement in Scots law a European directive from 2007 and amend existing Scottish procurement legislation: the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006. The 2006 regulations govern the processes and procedures that have to be followed by public bodies when awarding contracts over a certain financial value.

The purpose of European directive 2007/66/EC is to improve the effectiveness of review procedures with regard to contract award processes, and the new 2009 amendment regulations introduce two main changes to the 2006 regulations. First, they create a harmonised standstill period across all member states of the European Union between the decision to award a public contract and the notification of all bidders of that decision, and the award of the contract itself. The standstill period is designed to allow bidders to determine whether they wish to challenge the decision. Secondly, they introduce "ineffectiveness" as a remedy for breaches of procurement legislation. The concept of ineffectiveness is new to corporate procurement, and the 2009 regulations set out the circumstances under which courts shall make an order for ineffectiveness. An ineffectiveness order will render all rights and obligations in a public contract unenforceable from the date of the order and will state that the obligations rendered unenforceable shall not be performed by the parties.

If the court makes such an order, it shall also order the payment of a financial penalty by the public body and, in addition, the court may make any other such orders as it thinks necessary and appropriate to address the consequences of effective early termination of the contract. The court may decline to make an ineffectiveness order when it believes that there are overriding interests that require obligations under the contract to be maintained, but, if the court declines to make an ineffectiveness order, it shall require the public body to either pay a financial penalty or shorten the duration of the contract. When a financial penalty is ordered, the order shall state that the money be paid to the Scottish ministers. The 2009 amendment regulations stipulate that the Scottish ministers shall pay this penalty into the Scottish consolidated fund.

The European directive's requirement is that fines be imposed in certain circumstances. Proceedings that will be brought under the amendment regulations will be civil proceedings. The Scottish Government takes the view that the directive's requirements are satisfied by the imposition of civil financial penalties and not criminal fines. The Scottish Government's view is that reference to "fines" in article 2(2)(b) of the Scotland Act 1998 (Designation of Receipts) Order 2009 refers to criminal fines but not to civil financial penalties. The Scottish Government is therefore of the view that any financial penalty paid into the Scottish consolidated fund under the new amendment regulations would not be a designated receipt and need not be paid to the secretary of state. In other words, money received in the form of civil fines under the regulations would become income that was available to be used by the Scottish ministers subject to the normal parliamentary scrutiny and approval of the Scottish budget and in-year budget revisions.

As this is a new procedure, it is not possible to state with any degree of accuracy how often the courts will order payment of financial penalties, nor indeed the level of financial penalties that may be levied. The regulations merely state that the order must be "effective, proportionate and dissuasive". To my knowledge, only four cases have been brought before the Scottish courts regarding breaches of procurement legislation since 2006, so historically the numbers have not been significant. Whether the number of challenges remains low under the new legislation remains to be seen.

**The Convener:** I invite questions from members.

**Derek Brownlee (South of Scotland) (Con):** I will pick up on the point that Iain Moore raised towards the end of his statement about whether the money would count as a designated receipt. If

I picked you up correctly, you suggested that it would not be a designated receipt, and therefore would effectively be within the consolidated fund and available for ministers to use as this Parliament authorised them. Has any discussion taken place with the United Kingdom Government on whether it also takes the view that the money would not be a designated receipt?

**Iain Moore:** Similar legislation covering procurement activities in the rest of the UK is going through Westminster, and the UK Government is aware of what is going on and is being kept informed of the wording of the legislation at every stage.

**Derek Brownlee:** I do not doubt that comparable legislation has been introduced at Westminster. I presume that the UK Treasury decides whether or not something is a designated receipt. Has the Treasury or the UK Government told you that it is satisfied that, as the regulations are drafted, there is no prospect of classing such penalties as designated receipts? I would think that, at this moment, the Treasury would be quite keen to get any receipts that it could.

**Iain Moore:** After consulting widely within the Scottish Government and seeking the views of all parties, we found the view to be quite clear: the Scottish Government's view is that such penalties would not be designated receipts. We have proceeded on that basis.

**Derek Brownlee:** I understand that that is the Scottish Government's clear view and, given what you have produced, such an interpretation does not appear to be unfair. However, the UK Government might well argue a different case. Is it correct to infer from what you have said that the Scottish Government is sufficiently clear in its own mind about its interpretation of the situation that it has not specifically sought the UK Government's view to confirm whether it is thinking along the same lines?

**Iain Moore:** We have liaised with, advised and been in dialogue with the Office of Government Commerce, which is part of Her Majesty's Treasury, on the drafting of the legislation and what we plan to do, and the view that these are not designated receipts has not been formally challenged.

**Linda Fabiani (Central Scotland) (SNP):** Is the Subordinate Legislation Committee aware that, with these amending regulations, the original legislation will have been amended more than five times? What is the background to that? I realise that you have already explained this a bit—I understand, for example, that it relates to the transposition of the remedies directive—but I would appreciate another short explanation of why you feel it necessary to take this route.

With regard to the section of the Executive note on financial effects, I can see clearly that the regulations are about public bodies and utilities adopting certain processes and do not impose any obligations on businesses. However, could this additional imposition on the procurement procedures of public bodies and utilities result in hidden costs for businesses?

**Iain Moore:** On your second question, I do not expect there to be any additional costs to businesses. As you have correctly pointed out, the processes relate to remedies against public bodies, and the fact is that the regulations will give businesses greater rights to challenge and better processes for challenging those bodies.

**Linda Fabiani:** But sometimes these things have unintended effects. Have you had any discussions with, for example, business forums that have given you comfort that they, too, feel that the regulations will be nothing but beneficial to them and will have no downsides?

**Iain Moore:** In the two rounds of general public consultation, we consulted business representative bodies, some of which responded and offered their views. There was nothing to suggest that businesses were concerned that the regulations would result in additional costs for or greater obligations on them.

**Linda Fabiani:** Can you roughly outline your reasons for substantively amending the original legislation for the sixth time?

**Iain Moore:** We realise that the convention is that, when a piece of legislation is substantively amended for the fifth time, it should be consolidated. Indeed, very early on in the process, we were proceeding on that basis. However, although the regulations themselves do not run to many pages, they are very complicated, and as we worked through the processes we came to the view that, in order to focus properly and ensure that things were implemented correctly, we should produce another set of amendment regulations and consider going back to consolidate some time this year. I think that I am correct in saying that we said in the second round of public consultation that we would consolidate the procurement legislation. However, as I said, because of the way in which events developed, the focus was on producing the regulations on time and correctly rather than on consolidation.

14:15

**Linda Fabiani:** So the legislation will be consolidated further down the line.

**Iain Moore:** That is certainly our intention.

**Linda Fabiani:** That will happen when other legislation is being transposed.

**Iain Moore:** Yes.

**Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD):** Good afternoon. I want to be clear about proposed new regulation 47C of the Public Contracts (Scotland) Regulations 2006 and proposed new regulation 45C of the Utilities Contracts (Scotland) Regulations 2006. I understand that the Scottish ministers will consider any moneys that a court orders to be paid as income, but the regulations say that such moneys should be paid into the Scottish consolidated fund. A clear explanation probably exists, but I do not understand why the regulations that Parliament is considering say one thing while the Government says another.

**John Williams (Scottish Government Finance Directorate):** The understanding is that the Scottish consolidated fund is, in effect, the Scottish Government's bank account. The money in the fund comes from the grant that is paid in from Westminster, national insurance contributions and any other odd items that might be paid in directly, and Parliament approves money that is to be drawn out of it.

If something that is a designated receipt is paid into the fund, the Scottish Government is obliged to pay that back to the Treasury. However, for any other items, if the Parliament approves, the funds can be drawn down to pay for Scottish Government expenditure. That is what would happen to the money that we are discussing, and access to the funds would need to come through a budget act or—more probably—an in-year budget revision.

I suspect that nobody has any idea whether income from the arrangements will be significant and, that being the case, we certainly would not budget for it. Such funds would probably appear as windfall income in the first year that fines appeared. It would then be for the Scottish ministers to propose ways to use that income.

**Jeremy Purvis:** I guess that this follows Mr Brownlee's point. Is there no mechanism for the regulations to state categorically how such money will be treated? I understand the general point about money being paid into the consolidated fund; the question is therefore about the definition of such money and who has power over how it is spent. I understand that the amounts might be £1,000, £1 million or considerably more—that will depend on the size of the contracts. Is there no mechanism for the Government to state clearly in the regulations how such money would be retained as income?

**John Williams:** I suspect that that issue is more for our legal people. I cannot comment on that.

**Jeremy Purvis:** Let us consider a contract that is awarded for the Forth crossing, for example.

The Government has asked the committee in effect to underwrite up to £30 million of contingent liability for the Forth crossing, so we have already been asked about the contingent liability of a contract of that scale. If such a contract involved challenging legal aspects, the sum involved could be substantial, and part of the consideration would be the use of that money if the sum were more than £10 million rather than £10,000. Does any mechanism exist to make it clear how that money would be determined, rather than simply having the Scottish ministers' view that it would be retained income?

**John Williams:** I am not aware of whether the drafting of the regulations can be changed. This is as much as I have seen about how the money would be treated.

**Jeremy Purvis:** Was such a mechanism considered when the regulations were drafted?

**Iain Moore:** No—not to my knowledge.

**The Convener:** John Williams said that the question was for the Government's legal people, from whom he could seek advice. If he sought that advice and informed us of the response, that would help the committee.

**Jeremy Purvis:** I have a question about the treatment of the Scottish ministers. I understand that the provisions apply to the Scottish ministers if they are the contracting body and that the court will treat the provisions differently in that situation. If ministers are the contracting body that is fined under the arrangements, they will pay the fine to themselves. That will be retained income, which they can decide how to spend. Is that correct?

**John Williams:** Yes.

**Iain Moore:** Yes.

**Jeremy Purvis:** I just wonder what penalty that would be. I am thinking not about the sum but about how there can be a disincentive to commit an offence if the offender is ordered to pay a fine that will go back into their own pocket. They could write a humble letter of apology, but that is all.

**Iain Moore:** When the directive was being debated at European level, a discussion took place about whether it is possible to devise a process whereby public bodies could be fined but the money would not leave the public purse. Directive 2007/66/EC was drafted with that objective in mind.

As I understand it, if the Scottish ministers are the contracting authority in relation to which an ineffectiveness order is made and the court orders a financial penalty to be paid, the money is paid straight back to the Scottish consolidated fund. To be honest, I am not familiar with the financial side of the matter, but I understand that a decision

must then be taken by the Parliament on how the money would be best spent. It is not a case of simply handing the money straight back to the Scottish ministers.

**Jeremy Purvis:** Retained income is reported to us in the budget documentation, but it is up to ministers to distribute it. Ultimately the Parliament authorises the overall budget, but the use of retained income in-year is a decision for ministers. I understand that a local authority or health board that was fined would lose a sum of money, so there is potentially a considerable penalty for such bodies, but there does not appear to be a penalty in relation to contracts entered into by ministers. What consideration has been given to what happens if ministers are the contracting body?

**The Convener:** I am not sure that that is a question for the officials.

**Joe FitzPatrick (Dundee West) (SNP):** If a minister committed the crime and was fined, I guess that the money would flow back into the general fund and not into their specific portfolio. There would be a penalty for the portfolio.

**The Convener:** If the witnesses want to clarify points after they have read the *Official Report* of today's meeting, they should write to us.

**Tom McCabe (Hamilton South) (Lab):** I think that the witnesses said this earlier, but, for the record, will you clarify that it is your view that you have kept Her Majesty's Government up to date on the Scottish Government's interpretation and that to date you have received no indication that HMG is unhappy with how you are proceeding?

**Iain Moore:** That is correct.

**Tom McCabe:** There was some point to what Mr Purvis was saying. I do not think that it is as simple as the portfolio minister not getting the money back—under another agenda item we will discuss changes to the format of the budget bill, which could overcome the issue. Clarification is needed, because we cannot have ministers paying fines to themselves; there must be a disincentive somewhere. Someone has to go away and think about that, lest the Government become a figure of fun because the arrangements are not credible. A remedy needs to be found—perhaps the money could go to the voluntary sector.

**The Convener:** Anything to do with Europe gets more complicated the more one looks at it.

If the witnesses have no further comments to make, I thank them for attending and for their evidence. We will await further written evidence on any issues that have come up during questioning.

Is the committee content to note the instrument?

**Jeremy Purvis:** I am not sure of the process. I am aware that it is a negative instrument and that,



so far, no member has lodged a motion to annul. What is the timeframe for what we do as a committee, considering that the Government officials are to come back to us?

**The Convener:** I will ask the clerk to assist at this point.

**James Johnston (Clerk):** The 40-day date is 19 January, so we are really up against the wire on this one.

**The Convener:** Do we agree to note the instrument?

**Members** *indicated agreement.*

## Budget Bill (Format)

14:25

**The Convener:** Item 3 is to consider further correspondence received from the Cabinet Secretary for Finance and Sustainable Growth on the format of the budget bill. Members will recall that we considered an initial letter from the cabinet secretary at our meeting on 15 December. Members have both letters and a note by the clerk in their papers, so we have correspondence on the matter.

The format of the budget documents and the budget bill are subject to an agreement between the Finance Committee and the Scottish Government. Following the additional explanation from the cabinet secretary, is the committee content with the changes, which are set out in the letter, being made with effect from the budget bill for the 2010-11 financial year?

**Jeremy Purvis:** I have concerns about the format of what the Government is seeking to do. I understand its position, but I am yet to be convinced about the real rationale for bringing things forward for this year's budget process. I am similarly concerned about the ability of this committee and, more so, subject committees to carry out scrutiny. I do not think that the change helps with that.

**The Convener:** In what way?

**Jeremy Purvis:** If the Government is able to report to Parliament on a wider basis, with the ability to vire money within departments at any stage, it will be harder to carry out scrutiny. The committee indicated in its previous reports that it wanted closer correlation between the stated Government aims and policies and the documentation that we get.

**The Convener:** Why should scrutiny be more difficult?

**Jeremy Purvis:** The committees are scrutinising departmental budgets, which are reported to them in more detail than the draft budget is presented. If the budget bill does not have the level of information on departmental limits that the committees expect as they scrutinise the forward budget, or ministers have greater ability to make changes within the overall Scottish budget, it is harder for the committees to scrutinise what the ministers' intentions are for the coming budget year.

**The Convener:** Are there any other comments? I have difficulty seeing that point.

**Joe FitzPatrick:** From what we have been hearing from the committees, I understand that

they want more detail at the other end. They have been constantly looking for more detail at level 4, rather than at the top end of the budget. That is where committees are looking for detail and we have encouraged that detail to be provided.

**Tom McCabe:** Jeremy Purvis has a legitimate concern, but the change is explainable. As I understand it, the main rationale for the change is to allow the cabinet secretary to drive down the level of underspend. If the Government is reporting an overall total, that is easier to do. However, he has given us a commitment that, if money is moved between portfolios, he will report where and when those movements take place.

If an individual departmental head has an underspend year on year, we can say that there is pressure on that departmental head because there is an underspend—they have not been able to use the resources in the interests of Scotland's people, whatever their portfolio is. In the same way, if that happens under the proposed system, it will be reported that money has had to be moved from a portfolio and was able to be used in another one, minimising the overall level of underspend. There is still visible management control over the people who head up departments. If there had not been, I would have been concerned, but there is. Nothing changes in that regard.

End-year flexibility has been a bit of a playground football in the Parliament from day one, but it should not have been. Given the climate that we are moving into, it would be in everyone's interest to minimise the resources that are unused at the end of a financial year.

14:30

**Jeremy Purvis:** I understand that and I understand the management tool that the finance minister would have. I also understand that there have been alternative approaches in the past, such as the central unallocated provision mechanism. However, as far as I understand it, the Parliament authorises the budget bill, which contains detail that represents parliamentary authorisation over and above the authorisation that the finance minister has to manage the overall Scottish budget.

Ultimately, departments and ministers know that there is parliamentary authority for their expenditure because it has been scrutinised to that level. If we simply move towards giving the finance minister the responsibility for managing the entire budget at his or her discretion, we should not necessarily scrutinise lines 2, 3 or 4 because we would simply authorise a global sum for Scottish Government ministers, ask them how they would spend it, decide whether they had the right political priorities and then let them do the

job. I am more satisfied with the Parliament's ability to scrutinise the budget under the current mechanisms, but other members may feel differently.

**The Convener:** Under the proposed format, we would consider the overall total and the minister would have duties regarding that. Given the current stringencies and circumstances, it is important to watch the overall total of the budget and for the minister to be answerable for that. However, the proposal also allows for scrutiny of the individual portfolios because we would see movements within them. That would give us an overview plus a view of the more focused parts of the budget. The minister has satisfied that requirement because his proposal allows us to scrutinise both aspects.

I am in the committee's hands. Does it wish to pursue the matter? If committee members want to consider it further, I would appreciate much more detail. We have approached the minister and received a reasonable answer and approach to budgeting.

Is the committee content that the changes that are set out in the minister's letter be made in the budget bill for the 2010-11 financial year?

**Members** *indicated agreement.*

**The Convener:** We can see how the proposal works in practice and, if we wish to suggest changes, we can.

## Financial Resolutions Inquiry

14:33

**The Convener:** Item 4 is consideration of correspondence from the Standards, Procedures and Public Appointments Committee on its financial resolutions inquiry. Committee members will note from the clerk's paper that the inquiry was instigated in response to a recommendation in our report on the review of the budget process. That report referred the issue to the Standards, Procedures and Public Appointments Committee, as the Finance Committee has no role in financial resolutions.

If the committee does not wish to comment, we will move into private as agreed under item 1 to consider our work programme. I will allow a few moments for the public to leave.

14:34

*Meeting continued in private until 14:44.*



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