The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

Wednesday 27 November 2013

Session 4

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INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE
24th Meeting 2013, Session 4

CONVENER

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)

COMMITTEE MEMBERS

*Jim Eadie (Edinburgh Southern) (SNP)
*Mary Fee (West Scotland) (Lab)
*Mark Griffin (Central Scotland) (Lab)
*Alex Johnstone (North East Scotland) (Con)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Garry Clark (Scottish Chambers of Commerce)
Pauline Graham (Social Enterprise Scotland)
Annie Gunner Logan (Coalition of Care and Support Providers Scotland)
Susan Love (Federation of Small Businesses)
Niall McShannon (Clydesdale Community Initiatives)
Anthony Rush (Confederation of British Industry Scotland)
Duncan Skinner (Glencraft)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

Committee Room 5

Scottish Parliament

Infrastructure and Capital Investment Committee

Wednesday 27 November 2013

[The Convener *opened the meeting at 10:00*]

Procurement Reform (Scotland) Bill: Stage 1

The Convener (Maureen Watt): Good morning, and welcome to the 24th meeting in 2013 of the Infrastructure and Capital Investment Committee. I remind everyone to switch off mobile phones, as they affect the broadcasting system. Having said that, I note that some members will be using their tablets, because their papers are in digital format.

Agenda item 1 is evidence from two panels of stakeholders on the Procurement Reform (Scotland) Bill. The first panel is made up of business representative groups in Scotland. I welcome Garry Clark, head of policy and public affairs with the Scottish Chambers of Commerce; Susan Love, policy manager for the Federation of Small Businesses; and Anthony Rush, from the Confederation of British Industry Scotland's infrastructure and environment group.

I start off by asking: will the bill deliver the Government's policy objectives of establishing

"systems which are transparent, streamlined, standardised, proportionate, fair and business friendly"?

Garry Clark (Scottish Chambers of Commerce): The bill is certainly a welcome part of a long process that has been going on for many years to improve accessibility to procurement for many businesses. We hoped that some of the reforms would perhaps have been implemented by now, as they could have been implemented without necessarily having recourse to legislation. In some cases, we could have changed procedures without going down the legislative route. Nevertheless, the bill represents a statement of good faith on the approach of Government to procurement. Successive Scottish Governments and Scottish Executives have taken the issue seriously. From a business point of view, our members want progress, and we want it to be made quickly.

The Convener: We will come on to the particular areas in which you want progress.

Susan Love (Federation of Small Businesses): The bill is an important step in setting out the behaviour that we expect of public bodies when they buy goods and services. It sets out the standards that we can expect on transparency and proportionality and how those are to be achieved. It is a good first step in that it sets out the basics of how those principles should be adhered to but, realistically, it will not solve overnight every single problem that every supplier has.

The Convener: Yes—because everybody wants to win the contracts.

Anthony Rush (Confederation of British Industry Scotland): There are positive proposals in the bill to reduce the burden on the tenderer, which we welcome. For example, there is the proposal to streamline the pre-qualification questionnaire system. Some of the measures will promote consistency and tendering best practice, which we welcome.

However, it is sometimes better to stick to best practice rather than try to reinvent it. We are uneasy about the bill, as it opens up contracting authorities to damages arising from failure to perform duties. That could easily be set out in guidance; indeed, there is already guidance and regulation in place that could be followed.

The effectiveness of the bill is wholly reliant on further guidance, regulation and orders from the Scottish Government or the Administration. Until we have seen those new orders and guidance in detail, it is difficult for us to comment constructively on whether the bill will be effective and will meet its aims.

The Convener: That is more or less the same for any bill. The details are set out in further legislation and guidance, which in this case must take into account forthcoming European Union procurement regulations.

Anthony Rush: The regulations will relate to contracts above certain thresholds; the bill relates to contracts below those thresholds, in essence. I accept that it is not unusual that there should be further regulations and orders, but in my experience the volume and importance of the regulations and orders that will relate to the bill are relatively unprecedented. Before we can comment on whether the bill will make good law, we will have to see what the regulations and orders do.

Mary Fee (West Scotland) (Lab): Will the bill assist businesses—small and medium-sized as well as larger businesses—to bid for and win public contracts?

Susan Love: Overall, yes. Would we rather have a bill than have no bill? Yes. As I said, the bill will not transform overnight the situation for small businesses who want to bid, but it will help.

Garry Clark: I probably agree with that. As I said, legislation is one route, and this bill is part of a long journey that we are on. There has been steady improvement over the years, but our

members would have liked more rapid progress. Having said that, I think that the bill is a welcome step along the way towards an approach to procurement that recognises the issues that small businesses, in particular, have. From that point of view, the bill represents a positive step.

Anthony Rush: The bill should make it easier for people to bid for public contracts. Whether it will achieve its aims of getting more SMEs or third sector organisations to win contracts is questionable, and we will have to wait to see the outcome. The Scottish Government's statistics show that SMEs are already performing quite well. There is a danger that the bill could be discriminatory. EU directives are intended to open up borders, and there is a danger that the bill will put up barriers.

Mary Fee: Do you mean barriers for SMEs?

Anthony Rush: No, I think that the danger is that the bill will put up barriers for companies that are not rated as SMEs. We are also in danger of erecting barriers in relation to some of the exclusions in sections 22 and 23. We have to be cautious about that, but the intention of making it easier to bid and to pre-qualify is long overdue and very welcome and will lead to good practice.

Mary Fee: Does anyone want to comment on the potential for putting up barriers?

Susan Love: We have quite a long way to go before we can say that there are unfair barriers for large multinational businesses in relation to procurement in Scotland as a result of the bill.

Mary Fee: That is a fair point.

Are the proposals in the bill, including the level of procurement to which they apply, clear and easy to understand for business?

Susan Love: Do you mean in relation to the thresholds?

Mary Fee: I mean in relation to how companies bid, how they get into the process and thresholds—yes.

Susan Love: A lot of work has been done to try to improve businesses' awareness of how the system works. Will the bill help that? Yes, depending on how individual bodies' strategies set out measures to help open up access for SMEs. Much will depend on what bodies put in place and whether they use some of the good tools that are out there to help to explain the process to small businesses.

Garry Clark: The structures look about right in terms of the progress that has been made to date to open up opportunities through public contracts Scotland and so on. The structures are definitely improving, and that is making contracts more accessible to small business.

As others have said, the proof of the pudding will be in the eating. We need to ensure that more and more SMEs pick up the contracts. The legislation creates the right structures to allow that to happen, but it still needs to happen once the legislation is in place.

Mary Fee: So there is more work to be done.

Garry Clark: Yes, and we need to take proper measurements to ensure that the bill is having the desired effect.

Anthony Rush: I agree with my colleagues on all of that, and I would probably be a little more optimistic. Good progress has been made in procurement systems in Scotland. That is very welcome.

What we would like to see—and what we would advise—is to have more consistency and standardisation throughout procurement, including forms of contracts as well as methods of procurement. A result of adopting these proposals should be that there is more consistency, which will better safeguard the public purse.

Mary Fee: Is there a job for the guidance? Does the guidance fit in to the whole process?

Anthony Rush: There is guidance. The guidance has to be read.

I have to admit that my view throughout the process has been that this legislation is not necessary. The guidance is there to be followed. The benefit of the approach in the bill and the approach that the Administration is taking on procurement is that it should create consistency and standardisation. The problems that I have been involved in with public procurement have mainly been when the contracting authority has stepped away from standardisation and consistency and adopted some new idea.

Mary Fee: Okay. Are there any other comments on that?

Susan Love: As Garry Clark mentioned, it is fair to say that a number of the measures in the bill are things that we would not ordinarily expect to legislate on. The tools and the guidance have been available for some considerable time and yet there are many public bodies that still do not use them. They are technically not breaking any rules, so what can be done? We find ourselves in a situation in which rules have to be made to make public bodies use them, so that suppliers know what to expect and can expect a consistent standard of service from our buying bodies.

Garry Clark: To add to that, when businesses have a problem in the procurement process, it sometimes comes down to individual attitudes on the purchasing authority side. Although, as I have said, a lot in the bill could have been done without

legislation, perhaps legislation is helpful to give purchasing authorities the confidence to give contracts to small local businesses, which is where in many cases we would like them to be.

The Convener: You said that we have come a long way already. What are the good practices that we need more people to adopt, whether it be tenderers or contracting authorities?

Garry Clark: We have come a long way over an extended period, going back to the McClelland report seven or eight years ago, and through the work of the supplier engagement working group, which was set up in 2010 and which has been chaired by our chief executive Liz Cameron. We have certainly made progress in the visibility and accessibility that the public contracts Scotland website provides in relation to many, but not all, public contracts in Scotland.

10:15

We have also made progress towards a standardised PQQ. For small businesses in particular, the PQQ has been a barrier to accessing contracts for some time because it is a burdensome process. Scottish Chambers of Commerce is a small business. We participate in public contracts and we have been successful in operating some of them. As a result, we have also been through the public procurement process, and we can certainly speak from experience about the volume and intensity of work that is required to go through a process that may ultimately be fruitless.

We have made good progress in lowering some of the barriers for business and in making public contracts more open, accessible and transparent. However, there is still a long way to go as regards getting the number of SMEs that we would like to see participating in and winning public contracts and supporting local jobs.

Alex Johnstone (North East Scotland) (Con): Given some of the answers that we have had to questions already, I will ask a simple question. Do you support the introduction of the new regime for below-EU threshold contracts?

Susan Love: Yes.

Garry Clark: Yes.

Alex Johnstone: We have two yeses.

Anthony Rush: It is an interesting question. We support anything that makes pre-qualifying and tendering for public contracts easier. There has been a need for it, and the Administration should be congratulated for going that far. However, I am wary of some of the bill provisions. I do not know how they will work out. The idea of tying non-conformance with the procedures to the danger of civil action could be a negative step.

Alex Johnstone: Perhaps the next question that I need to ask all of you is: what are the implications of the thresholds for the businesses that you represent?

Anthony Rush: I suppose that the CBI is seen to represent more major businesses than small businesses and there is small business representation here, so, if you will forgive me, I will speak for large businesses rather than for the business community as a whole.

I cannot see what else could have been done with thresholds. If we are going to have thresholds, we cannot go above the EU thresholds so we have to set a limit below the thresholds. It strikes me that, when there is a danger of legal action against an authority, authorities may possibly look to tailor their procurement outwith the two thresholds. They could put multiple contracts up above the EU threshold or reduce contract sizes to below the threshold so that they do not risk legal sanction.

I am old enough to be cynical—forgive me for being cynical about such things but I think that that is a possibility. I do not think that there is possibly that much flexibility for authorities to do that, but overall you have to make up your minds about whether the bill represents best value for the taxpayer.

Alex Johnstone: What do the FSB and the SCC think about it?

Susan Love: The threshold for the new rules for Scotland had to be set lower than the current EU thresholds. By and large, most FSB members and most small businesses will not bid for contracts that are currently above the EU thresholds. They will be dealing with much lower-value contracts, so the threshold has to be lower than that.

Equally, we have to recognise that not every single process can be applied to every single contract. We will, of course, have to have lighter regulations for very low-value contracts—it would not be efficient otherwise—so the question is where to draw the line.

I think that the threshold that has been drawn at £50,000 for supplies seems reasonable, bearing in mind that such a contract could be spread over a number of years. There could be a lower-value spend each year—for example, a small business could be delivering £20,000 in a year. I think that that threshold is therefore fair. I understand that public bodies will feel that it might place additional requirements on them that might have resource implications, so I am prepared to accept that we go with the £50,000.

Equally, most small businesses will be bidding for work substantially below that £50,000 threshold, and when they are talking about low-

value spend they will be talking about sub-£10,000 spend. We must ensure that we shine a light on the processes below the £50,000 threshold as well. Although we would not expect every single check and balance to be applied to all contracts, there are some aspects of the bill that we would like to see cover all spending. Elements of procurement strategies should cover all of an organisation's spending, including its below-£50,000 spending, to ensure that good practice applies across the organisation's buying and not just to contracts above £50,000.

Garry Clark: As others have said, the threshold has to be drawn somewhere, and the £50,000 threshold seems appropriate for the broad scope of public sector contracts. We certainly do not have any major issues with that.

Alex Johnstone: My final question about thresholds concerns how businesses were consulted by the Government prior to the introduction of the bill. Do you feel that there was enough consultation to establish the thresholds?

Anthony Rush: Consultation is one of those areas where beauty is in the eye of the beholder. In this case, the bill team is to be congratulated on doing an extremely thorough job of consultation and on learning rather than just box ticking. I have to say that I cannot actually remember much discussion on the question of thresholds in the consultation and in the advisory groups that I have sat on. However, as far as consultation is concerned, the bill has been an exemplar.

Susan Love: There have been many discussions and consultations over recent years about how and where different rules should apply. There was a lot of discussion about the levels of contracts that are important to small businesses, but I do not recall a specific discussion recently about whether £50,000 should be the threshold for regulated contracts. I think that there was a question in the consultation about what would define major contracts, rather than the regulated contracts. I cannot say that I can recall a specific recent consultation about that point.

Garry Clark: As I have mentioned already, the process has gone on for many years. The Government has engaged with the business community frequently and in depth through the supplier engagement working group and in other ways. We had some issues with the formal consultation on the bill when it came out, but I do not recall us actually making any recommendations with regard to thresholds as part of that formal consultation. That said, there has been a host of consultations over many years between the Scottish Government and the business community on that and other issues.

Alex Johnstone: Is it nevertheless the case that, in your view, the outcome on thresholds is about right?

Garry Clark: It is about right.

Anthony Rush: I think so.

The Convener: Okay. We move on to part 2, on general duties and procurement strategies.

Gordon MacDonald (Edinburgh Pentlands) (SNP): Under the proposed sustainable procurement duty, the contracting authority must consider how it can

"improve the economic, social, and environmental wellbeing of the authority's area"

and

"facilitate the involvement of small and medium enterprises".

Do you think that the bill will achieve those aims? If not, what changes would you like to see to enable those objectives to be achieved?

Garry Clark: That expression is a good starting point. It reflects the issues that we would like to see addressed and recognises the true potential economic value of giving contracts to SMEs in a local area. We have spoken about that for many years and want to see a true reflection of that economic value.

Those provisions are welcome. I have spoken to many purchasing authorities, and many of them would like to feel more confident about their ability to make such decisions. However, up to now, they have not had the reassurance that they require from the Scottish Government. Enshrining that proposal in legislation has a positive benefit. It remains to be seen whether it will have the required effect and whether it will change processes and decision making within the purchasing authorities, but enshrining the proposal in legislation is a positive step towards allowing more SMEs to participate in the public procurement process.

Susan Love: I will reflect on how some public bodies have reacted to the duty and how they feel about it. There seems to be quite a strong feeling that public bodies already achieve all those objectives and are already super-duper in their support for SMEs. However, they then go on to say why they should not have those duties under the bill. I am a bit confused about why, if they are already achieving those things, they are concerned about that.

We want to move from a general statement of support for those principles—which all buying bodies would say they are already signed up to, as some elements of their buying habits suggest that they meet the duty—to embedding those processes and principles more in public bodies'

routine buying. That is the challenge of where we are in procurement at the moment. There are some fantastic projects going on, in which a range of sustainable procurement principles have been put into place, whether through training, through sustainability or through involving local contractors, but we need that approach to be reflected in the day-to-day buying.

From our point of view, how the guidance is drawn up, particularly in relation to the strategies that will be expected, will be absolutely critical to how the duty delivers on the ground.

Gordon MacDonald: Are you saying that most contracting authorities need to review their whole procurement procedure because it has developed over many years and has become a standard, tick-box exercise? Do they have to review it to ensure that those aims are enshrined in it?

Susan Love: Yes. I have read procurement strategies in which there are paragraphs about the organisation having a great record on supporting SMEs, wanting to do more of that and running supplier development programmes—and that is it. If an organisation's strategy is about putting on a couple of events to tell small businesses what might be available and what they need to do in order to conform to the organisation's buying processes, frankly, it should not bother. We want to see much more detail across an organisation's processes about how it will achieve that.

I want individual organisations to think about what the principles mean to them, as that might differ. For instance, a small rural local authority might think that certain parts of the sustainable procurement duty are more important than others and might want to reflect the fact that it is spending in a different way from, say, a large national agency. That is fair enough. A buying organisation should think about what the duty means to it and how it will reflect that through its processes, but I do not see enough of that happening at the moment. That is not to say that there is only bad practice, but there needs to be more rigorous consideration of how processes across organisations can be changed to genuinely achieve those aims.

10:30

Anthony Rush: At first sight, the proposal looks attractive and sensible. We would welcome and endorse anything that rebuilds the middle ground in Scotland, particularly for the delivery of infrastructure. I have been in Scotland for 30 years—perhaps members can tell from my accent—and I have mainly been in the construction industry. In that time, we have lost the middle ground.

A clearer definition of SMEs is needed. I have puzzled about that, but I think that that is needed. What does the reference to 250 employees mean? Does it mean that 250 employees are on the payroll or that 250 people, including subcontractors and subordinate suppliers, are employed? I think that the conventional definition of an SME is anything that has a turnover of less than £50 million. On balance, that needs to be the definition.

I assume that the duty is meant to apply only to local authorities—I cannot see how it could apply to anybody else. I question whether local interests should take priority over national interests and whether local interests should take priority over best value.

To take one of the CBI's policies, the provision does not promote the use of outsourcing. If we set aside all the other arguments about outsourcing, in my view, it is the sure way to give SMEs more business. The bill tries to give SMEs a bigger share of the existing cake. However, increasing the size of the cake by outsourcing more would increase business for SMEs.

When Administrations espouse the need for better relationships between employers and employees, it is wholly wrong to demonise private enterprise by implication. That is an important issue that the bill misses the chance to address.

Gordon MacDonald: You said that Scotland has lost the middle ground in company size over the years. Will the bill nurture small businesses so that they grow to fill the gap?

Anthony Rush: The bill is probably a step towards that, but it is not all that is needed. The aim must be to rebuild the middle ground, where we have lost a lot of our talent and skills—certainly in the industries that I have worked in since I have been in Scotland. That is a sad loss. We lost a lot of those businesses because they were owned by families rather than shareholders. That is a difficulty. Scotland would benefit if we rebuilt the middle ground.

Gordon MacDonald: Do you see any conflict between the sustainable procurement duty and the general duties to treat suppliers without discrimination and to act in a transparent and proportionate manner?

Anthony Rush: I am not a lawyer, although I sometimes sound like one. I fear that there might be a conflict. If implementation is not carefully managed, the danger is that the measures could create discriminatory situations. I see more work for my legal friends arising from the bill in advising local authorities on whether their proposals are discriminatory and in advising unsuccessful bidders on taking civil action.

Susan Love: I suppose that there is the potential for what Anthony Rush describes but, given that we know that most of our public bodies are risk averse, we are some way from their being accused of discriminating in favour of local small businesses.

Garry Clark: An awful lot of local authority lawyers have spent an awful lot of time on ensuring that local authorities are as cautious as possible. It is important that we begin to take steps towards rebalancing the position in the economy. According to the bill consultation, 45 per cent of contracts by value went to SMEs. Given that they comprise 99.3 per cent of businesses in Scotland, the remaining 55 per cent must be going to 0.7 per cent of businesses. There is clearly scope to draw a fairer line among businesses in Scotland.

The Convener: But is that true? Your figures are right but a contract might go to a bigger contracting body that then subcontracts the business.

Garry Clark: Business will clearly flow down in that way, which is why we need greater transparency in the system. Nevertheless, the figures are fairly stark and there is definitely some scope for rebalancing.

Susan Love: There are all kinds of hazard warnings around the procurement data. It is fair to say that the data is the best in the UK, but there are all sorts of difficulties with regard to things that are not included or other gaps. That said, despite all the measures that we have allegedly put in place to help the sector, the SME spending figure has remained constant for at least the past three or four years. I am not saying that we should put a target on it but there is still scope to improve on and do more about a situation in which less than half of our spending goes to 99 per cent of our businesses.

The Convener: Jim Eadie has some questions about specific duties.

Jim Eadie (Edinburgh Southern) (SNP): Good morning. Part 3 places a requirement on contracting authorities to publish regulated contracts on the public contracts Scotland website. Do you support that measure and will it have specific benefits? For example, will it make it easier for companies to bid for and win contracts? Returning to Mr Rush's earlier point, will the duty be helpful or unhelpful in addressing consistency and standardisation or will it make no difference?

Garry Clark: Public contracts Scotland represents a great step forward as an attempt to codify what had been a very diverse range of contracts that were not always published in a consistent and transparent way and definitely makes it easier for business to be aware of and potentially access opportunities. Some burdens such as the amount of time that small businesses have to spend in some of the processes along the way have not yet been overcome, but PCS has undoubtedly been a positive move that definitely makes things more transparent and open and opens up opportunities.

As for whether this particular requirement will have any effect, as Susan Love has pointed out, the value of contracts going to SMEs seems to have been fairly static over the past few years and greater effort needs to be made to ease the process. PCS makes things more open and apparent to business but there are still processes that are very burdensome for small businesses in particular to deal with when bidding for contracts. Only when we address the issue of transparency as well as the ease with which tenders are submitted will we see positive changes in the SME market.

Susan Love: It is worth reflecting on where we were six or seven years ago. At that pre-McClelland point, there was no single place for advertising contracts; in fact, you could not even find the contracts. The establishment of PCS as a single portal for Scotland has been a great step forward and has made it much easier for small businesses to at least find the contracts that are available. As Garry Clark said, actually winning the contract is another thing but at least we can now access the opportunities.

This is one of the measures in the bill that ordinarily we would not have to legislate for. By and large, most public bodies will already be complying with this approach; however, there is a chunk of contracts—presumably those between the £50,000 threshold and the EU threshold—that are not currently going through PCS but will be as a result of the bill. That is good, because it means that more contracts are going through the portal. I find it genuinely sad that we have to legislate for this but it is unacceptable that any public body should be creating its own portal or way of advertising when we have this great tool that businesses know about.

Jim Eadie: Just to be clear, you support the requirement in the bill.

Susan Love: Yes.

Anthony Rush: It is a good step, but as for whether it will be effective the fact is that you cannot please everyone. There are two ways of creating more business for SMEs: either to increase what I call the cake or to reduce the competition from larger companies. Given that, as I know from experience, larger companies are quite fleet of foot in creating local SMEs, I am not certain that such a move will necessarily have the desired result.

One of the important new provisions in the bill is the requirement on contracting authorities to have procurement strategies. I do not think that you need to do all the work for companies to make their life easier; if those procurement strategies are properly drawn up, it is beholden on companies to take note of them and to develop their business model in a way that makes best use of them. If the legislation is going to be effective, there will have to be a two-way relationship.

Jim Eadie: Coming back to my original question, I wonder whether you see a role for the public contracts Scotland website in facilitating the standardisation and consistency that you mentioned.

Anthony Rush: Yes. It is part of the whole parcel and is, I think, a good move. If you look back at what we have previously said about procurement, you will find that we are in favour of procurement bodies, by which I mean not just PCS but other infrastructure procurement bodies that create more consistency and standardisation.

Jim Eadie: Will the single point of inquiry for complaints be burdensome to businesses?

Susan Love: I do not think that it will be burdensome to businesses. The single point of inquiry was another of the measures that had been asked for pre-McClelland, because businesses that felt that they had been badly treated had nowhere to go to make complaints. After all, most businesses in that situation are highly unlikely to want to complain directly to the body that might be a future client. Because we knew that complaints were not being made and no one was following up what was going on, the single point of inquiry was established.

As we have suggested in our evidence, it is good for businesses or the third sector to have an anonymous port of call for raising complaints about the processes that they have been through. However, the difficulty is the extent to which the single point of inquiry can resolve those complaints or address the issues that might have been raised. If legal rules have not been broken, what can the single point of inquiry do? It relies largely on the business itself complaining and single point of inquiry officials liaising with the public body in question and asking, "What's happening here? What have you done? Don't you realise that you should probably not have done it that way?" In some cases, there will be a serious flaw in the process and it will have to be restarted. That is fine. In other cases, everybody agrees to disagree and the process is dropped.

10:45

However, there are a number of cases in which what the public body has done is probably not good practice. It is probably recognised as something that we would prefer the body not to do, but nobody can tell it not to do it. In those cases, the business feels aggrieved that it has been treated badly, but nothing can be done and it has no recourse. At the moment, it has the single point of inquiry or it can go to court. However, most small businesses cannot afford to go to court so they feel that there is nowhere to go.

That is why it was suggested that there could be space for a remedy in between the court and the single point of inquiry.

Anthony Rush: I am in favour of the principle of ombudsman, regulator and complaint body-type systems.

Jim Eadie: Do we have that at the moment?

Anthony Rush: We do not in relation to procurement, and we must learn from some of the problems in similar single-point-of-complaint bodies around the country. Such regulators do not get good press at the moment.

There is a slight contradiction between that proposal and the timeframe for raising an action in the courts. The bill provides for 30 days to begin proceedings. I take it that, conventionally, that would mean beginning formal proceedings by the issuing of a writ or summons, depending on which court the case was in.

The complainant is left with a dilemma about whether to refer the matter as a complaint or go straight to the courts. The sheriff court is not that expensive. If I was a small business and I was in that position, I would go to the sheriff court.

Jim Eadie: Are you thinking of the ombudsman being an alternative to legal action?

Anthony Rush: It would be, in practical terms.

Jim Eadie: That would require an amendment to the bill. It is not currently proposed.

Anthony Rush: The practicality of the matter is that it would be an alternative, because it would be a very efficient ombudsman who came back within 30 days and, if a business misses that timeframe, it is in danger of missing its opportunity to take legal action. That is the contradiction in the proposals. If I was a small business in that position, I would go off to the sheriff court, which would not cost me a lot of money. It would probably cost me as much to make my case to an ombudsman as it would to make it to the sheriff.

Jim Eadie: Do you support the provision that community benefit clauses should be placed on contracting authorities as well as the level of contracts to which the clauses would apply? I noticed in the FSB submission the suggestion that community benefit clauses must not become an

unintended barrier to participation by smaller businesses, so I am interested in your views.

Susan Love: In general, community benefit clauses or requirements are a good development in procurement. It is a good idea to apply them to large capital projects in particular.

I do not know whether anyone particularly disagrees with the £4 million limit. It is relatively high and it might be envisaged that it will come down in future. However, at the moment, because of the £4 million plus level, it is unlikely that many small businesses would be involved.

Our concern is that, when CBCs become mandatory, they will start to become part of a pro forma approach to projects. We know that buying bodies are fond of such approaches; they get into a way of doing things. Good CBCs are about, or are specific to, a particular project. They recognise what type of community benefit might work for that project. It might be about not just construction apprentices, but other bits and pieces. Our worry is that if CBCs start to be slapped on every project the buying bodies will take less time over constructing them and will end up simply using a formula and saying, "We will have 10 of that kind of apprentice, 10 of that kind and 10 of that kind."

The difficulty with that is that, if there is no flexibility around the outcome that an organisation is looking for from the CBC, it will put up a barrier to a lot of local small businesses that can deliver the benefit that it is looking for. They may have a good record on local training and use local apprentices, but they might not be able to take on 10 of a specific kind of apprentice. That is our concern about how CBCs might develop. They might become just another requirement that a lot of smaller businesses cannot meet while bigger businesses will be able to say, "No problem. We'll deliver that."

There is also a wider issue about how that will be monitored to ensure that those companies are delivering what they have said they will deliver in community benefit. Is a larger business hiring 10 apprentices who are then sacked at the end of the 18-month project a better outcome than having a number of small local businesses involved that employ one or two local apprentices each who will still have a job at the end of their four-year apprenticeship?

Anthony Rush: My view is that, with a threshold, it may not be a big issue because we quickly get into European directives in any case. However, the idea of contractors providing community benefit is a sound idea and a lot of our members do it voluntarily. Provided that the benefits that are asked for are proportionate and sensible, that is a good thing.

Garry Clark: We support the principle of community benefit clauses, certainly at the levels at which they are scheduled to apply. The bulk of the bill should be about ensuring that as many SMEs as possible can participate in the procurement process and we would not expect the clauses to be a barrier to that at the levels at which they would apply. We would not, however, want to see any clauses attached in the future that could be a barrier. It is all about application. We see no problem with including the provisions in the bill.

The Convener: Are community benefit clauses often passed on to sub-contractors without much discussion of how best to implement them? Do you have any experience of that?

Anthony Rush: I have no evidence to suggest that that is the case. In my experience, where community benefit agreements have been entered into, the main contractor has done so enthusiastically and, in some cases, has provided more community benefit than they have been asked for. I do not recognise that as a complaint.

Susan Love: Up to now, a lot of the CBCs have been pretty good projects that have been well developed between the contractor and the buyer. Our worry is that, if they start to be used more routinely, the time that is devoted to developing the right solution for a project will decline and we will end up with a formula on a piece of paper being applied as CBCs. I worry that we might get into difficulty with that in the future.

The Convener: We talked to the national health service representatives about project bank accounts. Would those encourage more SMEs to apply for bigger contracts or for public contracts in general?

Susan Love: Project bank accounts are one way of tackling the issue of late payment through the supply chain. We asked the Scottish Government to consider that option, which it has, and the construction review looked at it as well. However, it remains to be seen how effective it will be.

The bigger issue is a more general one of business-to-business payment through the supply chain. There is a requirement in the strategies for buyers to set out how payment will be dealt with through the supply chain, with primary contractors expected to pass on payment promptly. However, there is nothing about how that will be monitored. We know from buyers that they really struggle with that. If they ask a primary contractor to pass on payment within a certain period, how do they follow that up? In some cases, the odd bit of monitoring goes on but, broadly, I do not think that it is monitored at all. Does a requirement for prompt payment through the supply chain apply

only to works contracts, where we are talking about the construction supply chain, or does it apply to every good that is supplied to the public sector and every person whom a supplier subsequently pays through their business?

The intention to tackle the issue is right, because it is a huge problem for small businesses. The measures in the bill could help to address the problem, but I think that information is still a little lacking on how we can make things happen and support our public bodies to deliver in that regard.

Anthony Rush: Payments to contractors and suppliers have been a source of complaint as long as I have been in the industry, which is an awfully long time. In many cases the matter is one of can't pay, rather than won't pay. We have to be careful that in expanding the system and introducing smaller companies into it we do not put such companies in a position in which they overtrade and cannot pay. Project bank accounts might address that.

There is another issue that troubles me in this context. What is the debt that is due? Is it the debt that the supplier or sub-contractor claims, or is it the debt that the main contractor certifies as being due? It is not clear to me which would be the case in the project bank account system. If we are talking about the debt that is certified as being due, I am in favour of the system. It is probably a good system, which will prevent the overtrading dilemma. However, it would not be fair, reasonable or proportionate to put a main contractor in a position in which he has to pay what is claimed.

The Convener: Do the other panel members have a view on that?

Garry Clark: There is perhaps something to be said for the approach. There would need to be checks and balances, so that people could determine whether the sum that was being claimed was fair and reasonable, given that there might be issues between contractor and supplier.

The main issue is whether, in relation to a regular, standard contract, where there are no major issues, we are creating a system that could make it slightly easier for a smaller sub-contractor to be paid on time. The proposed solution would potentially make that more likely, so in that respect it is welcome. However, conflict between contractor and supplier would need to be addressed. Perhaps the courts would have to be involved in that.

Anthony Rush: The courts do not have to be involved. The Housing Grants, Construction and Regeneration Act 1996, which I suppose came into law nearly 20 years ago, was intended to address that very point about settling disputes and securing payment quickly. We should learn from the fact that it has not done so.

Mark Griffin (Central Scotland) (Lab): Sections 22 and 23 have been mentioned briefly. What is the panel's opinion of the Government's proposals to address workforce issues, such as inappropriate use of zero-hours contracts or the operation of blacklists, through guidance?

Susan Love: We recognise that most people want action to deal with inappropriate buying behaviour and inappropriate practices by certain businesses. We all feel that such businesses should not get public contracts—I think that that is generally accepted and is something that we want to tackle.

Setting out more clearly the terms on which potential bidders can be excluded on the basis of certain practices is a good step forward, because we understand that certain parts of the public sector are nervous about what they can do within the rules.

11:00

The difficulties for us arise around what will be encompassed by guidance on general workforce matters. The workplace policy that is appropriate for a small business with five people might be very different from the policy that is appropriate for a multinational company. That is where we start to worry about what the guidance will look like and include, and whether it will put up more barriers for small businesses.

If it is just about saying, "Blacklisting is the type of gross misconduct that we think is unacceptable, and you can be excluded from bidding if you do that," that is fine. There are, however, questions about how we determine what is appropriate use of zero-hours contracts and how that might be set out in guidance in sensible terms.

Anthony Rush: I think that I agree with all of that. The question of blacklisting is interesting, because it is currently a criminal activity, and I see that it is right to exclude from bidding contractors or suppliers who engage in criminal activity. I am less certain that the provisions should encompass directors and employers, because the criminal system punishes them. We must be very careful about that.

I am a bit confused about sections 22 and 23. I almost took legal advice on those sections, but then I thought that it would probably be more helpful if I reflected on my concerns about them. A sheriff or judge would almost automatically consider whether he should issue an interim order to sist or stop a procurement process at the point at which formal proceedings were taken. It seems to me that that would be in the public interest, because at that time the sheriff would either issue the order or decide that the case was vexatious or

had little chance of succeeding and strike down the proceedings. We have to be careful about that.

I am not certain that it is in the public interest to place limits on the court such that if a contract has been entered into the court can only award damages, because there might be circumstances in which it would be dangerous or not in the public interest to continue with a contract, if a case had been won against the authority.

Also, if we are looking for loopholes in the bill, I wonder whether the call-off provisions in section 6(2)(b) are confusing and need to be looked at. That bit probably needs to be struck out, because if something falls within a framework contract it is covered by the provisions that the Government seeks to exclude in section 6(2)(b).

Overall, we have to be very careful about the approach. I think that things were better when a contractor could be given a yellow card for poor performance. In my experience, the industry benefited from that approach.

Garry Clark: I agree with Susan Love that we want to drive out of the procurement process businesses that engage in criminal activities or certain unsavoury practices. However, we need to be cautious about interpretation. For example, offering zero-hours contracts is sometimes a positive and productive way of running a business, for the business and for the staff—sometimes it is not. There are questions about how to judge what is appropriate and inappropriate, but by and large we support the intention of excluding from the process those businesses that are operating with dubious practices.

Anthony Rush: I would like to make a point about zero-hours contracts and SMEs. A lot of owners of SMEs are de facto on zero-hours contracts. They only earn what they earn and there are no guarantees.

Mark Griffin: You have spoken broadly in support of the Government's proposals, but you mentioned difficulties in implementation. Have you been able to comment or offer feedback to the Government on any specific proposals on the guidance?

Susan Love: The section on guidance and workforce issues had not appeared prior to the publication of the bill, so there has not been a great deal of debate.

Mark Griffin: So there has been no consultation.

Susan Love: There has been discussion about the problems that we want to solve and, as Garry Clark has said, there is quite a lot of consensus about certain practices that we would like to see stop. We are now seeing the solution for the first time in the bill, but there are a lot of questions around what it will look like in practice. We have had some initial discussions with the Scottish Government, but there is a lot more discussion to be had.

For example, if we are asking about workforce issues, our understanding is that the provisions would apply only to the workforce involved in the contract, but that raises further questions. Are we really interested only in those workers who will be delivering the contract? Do we not want to ask more general questions about the wider business and whether other employees who are not delivering the contract would also be getting the good practice that we want to see? How will any of it be enforced? How are buyers supposed to consider issues that cannot be included in a scoring matrix? Buyers are supposed to use the guidance to help them consider how to select tenders, but I am not clear how they would do that and therefore what it might mean for small businesses. Our worry is that, if buyers are encouraged to consider those matters, they will ask all bidders to supply information on all those matters, and if that list grows and grows we will quickly find ourselves back in a situation in which bidders are being asked to submit reams of information that might not be necessary on all occasions.

Mark Griffin: In addition to those points on zero-hours contracts and blacklisting, the Government has also spoken about the possibility of using guidance to encourage employers to pay the living wage. Do members of the panel have any comments on that?

Garry Clark: I return to the point that the intention of the bill is to encourage greater participation by SMEs in the procurement process and in winning more contracts and orders and getting a greater share of the value of those contracts. We hope that all provisions and guidance will be geared towards achieving that objective. This part of the bill looks at criminality and wrongdoing, but the failure to pay a living wage, as opposed to the failure to pay the minimum wage, is not criminality or wrongdoing. Clearly, payment of the living wage is a policy intention for Government, but we would not want any policy intentions to create new barriers to the participation of SMEs in the procurement process or to introduce costs where none existed previously.

Susan Love: Our understanding is that the guidance from the European Commission says that it is not possible to attach any criteria relating to wages that are above the set national minimum wage, so payment of the living wage cannot be a criterion for contracts. Beyond that, how can people who are bidding for contracts be encouraged to pay the living wage? Our difficulty,

as I said earlier, relates to how a buying body can consider the issue if it cannot be included in the scoring matrix. I do not understand how—all other things being equal—we can select between a business that pays a living wage and another that pays the minimum wage if that cannot be a criterion.

More generally, a lot of small businesses will say that they have been more than happy to pay the living wage for certain contracts if the buyer was prepared to allow the contract to be bigger. However, if the public sector is prepared to pay only a certain amount for a service and is not prepared to increase that despite wage costs going up by 20 per cent, you cannot reasonably expect small businesses to remain competitive and to bid for such contracts. They will just not bid. That would leave us with a situation in which larger businesses that can carry the cost or absorb it elsewhere will be able to commit to paying the living wage, so they will win the contracts and small businesses will not. I guess that this is a judgment about the outcomes that we are looking for and how we achieve them.

Anthony Rush: I have nothing to add to that. I am not in favour of involving conditions that require suppliers or contractors to pay anything other than the minimum wage, because the minimum wage is set in law.

Mark Griffin: Part 3 of the bill includes a range of proposals to increase transparency. In particular, there is provision for organisations to offer a debrief and to provide information for unsuccessful bidders. Is that enough? Is there anything else that could help small and medium-sized businesses that have been unsuccessful, so that they can gear up for their next tender?

Garry Clark: The proposal is helpful—it is something that happens a lot at the moment. Having spoken to a lot of businesses who bid for work during the Olympic games, I know that the helpful learning process involved in that exercise allowed them to make successful bids for Commonwealth games contracts. It can be helpful for any business that is getting involved in public procurement for the first time to gain an understanding of the scoring that it receives at the end of the process, how that is arrived at and where it can make changes and bid successfully for future contracts. Because significant costs are involved, there is a huge amount of frustration for companies—particularly small businesses—that bid unsuccessfully for contracts, but positive feedback that allows a business to make successful bids in future is extremely welcome. That is certainly the minimum that we would expect.

Susan Love: Procurement specialists who work with small businesses will say that that feedback is absolutely critical to small businesses in allowing them to understand what they need to do to win more public sector business. The quality of feedback has improved in recent years, but it is important that suppliers have the right to ask for that feedback. The concern is around how meaningful the feedback is, and I think that the bill has probably gone as far as it can go at the moment to reach the right balance. I understand the buyers' concern that that they cannot possibly write chapter and verse to every single bidder setting out how their bid could be improved; equally, businesses do not want a completely anodyne letter that lists four options for why they have been unsuccessful, with a tick against one of them. That does not really provide the feedback that they need on what was wrong with their bid or the areas where they need to improve.

I think that the provision in the bill is fine. I do not want it to develop into a bland tick-box exercise. I want businesses still to be able to ask for more meaningful, in-depth feedback. Not everyone will do that, but where businesses ask for that they should get it.

11:15

Anthony Rush: I feel a little bit guilty in agreeing with that because we are in danger of putting a huge compliance burden on the buyers with that requirement, particularly if there is a large number of bidders. The bill does not address that issue.

A major complaint for bidders, particularly with complex contracts, is that there are too many bidders and too much competition. The more you open that up and increase the number of tenderers, the more work that you give the buyers in providing feedback to individual companies on why they did not succeed. The principles of transparency and feedback are absolutely right, but is it practical to expect contracting authorities to provide effective feedback? If they are happy with that, I will be delighted.

The Convener: Adam Ingram has questions on part 4, which is on remedies.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): Is the remedies regime for sub-EU threshold procurement necessary? If so, are the provisions appropriate? There seems to be some difference of opinion on the accessibility of the courts to small firms, for example.

Susan Love: We have all pitched in on that topic to a certain extent. We do not have any particular views about that part of the bill because we genuinely think that most small businesses will not use the court option. It is important to have the option, so that public bodies know that they must comply as there is a sanction at the end of the

process, but it is unlikely that most small businesses will use that remedy. Whether the bill opens up opportunities for more unnecessary court action by bigger businesses may be an issue.

Garry Clark: I agree. The sheriff court is generally seen as an expensive place for small businesses to seek remedies. I do not know whether the Scottish Government's plans to review the operation of the sheriff court will assist by making that a more affordable place to seek a remedy. It is seen as an expensive option that most businesses—certainly micro and small businesses—would probably not consider.

Anthony Rush: I am not certain whether small businesses will use the sheriff court, although I suspect that more will do so than people anticipate. In addition to what I have said previously about the matter, part 4 has the remarkable effect of making holding the contracting authority to account the responsibility not of the Government but of the supplier or contractor. Moving that responsibility on is not a good thing; the Government has existing ways and means of holding contracting authorities to account if they do not perform their duty or meet their obligation to procure best value.

Adam Ingram: How does the Government do that?

Anthony Rush: It could do that through the annual settlement, for example—it could reduce a local authority's grant.

Adam Ingram: I can envisage the stushie.

Anthony Rush: It may not be politically palatable. However, the bill moves the responsibility to the supplier and the contractor. As I say, that is not a good thing.

Adam Ingram: Okay. My final question is whether the bill could be enhanced. For example, could it include areas of procurement reform that have been left out? We had a session with businesses last night, and at the table that I hosted, it was proposed that the procurers—the contracting authorities—ought to skill up the people who deal with contracts. Should we include that idea in the bill?

Anthony Rush: I think that that should be happening, but I do not know whether it should be included in the bill. My experience as a supplier, as a contractor and as an adviser to public bodies on major infrastructure contracts is that the main difficulties are a lack of skills in procurement, a rush to meet timing and budget requirements, and the moving back from the supplier to the procurer of the risk profile. The McClelland report tried to address those issues, and I think that they still have to be addressed. However, I doubt whether the example that you gave should be enshrined in law. As I said, I fundamentally disagree with making holding the procurement authority to account the responsibility of the contractor and supplier.

Susan Love: There are many factors in procurement reform, and many aspects of the process need to be improved. Should all those be included in a bill? Probably not. There are two things that we hope will be achieved through the bill or the guidance. First, there is a need to encourage a presumption in favour of the smallest practicable lots for contracts, which we hope will be achieved by the need to think about proportionality and helping small and medium-sized enterprises. We could go further, but I would like authorities to have as part of their strategy the starting presumption that they use the smallest practicable lot size.

Secondly, we should ensure that the general duties apply to all the procurement processes in an organisation, not just the regulated contracts. That would send an important signal about the practices and standards that we want to see being applied across the piece, including to the many sub-£50K contracts that small businesses bid for.

Garry Clark: I reiterate that the bill itself will achieve much. It is really focused on ensuring the best possible deal for small businesses so they can access opportunities and increase their participation by winning contracts. On how we can go further to ensure that that happens, there is an awful lot to be done beyond the bill. The process has been on-going for a very long time, through, for example, the McClelland report, the supplier engagement working group and so on. There has been a lot of talk, and a lot of understanding on the part of Government of what needs to be done. However, we need to ensure that what Government understands is transferred to the purchasing authorities and that they are given the confidence to make the right decisions so that more business goes to SMEs in Scotland.

Adam Ingram: Okay. Thank you.

The Convener: I thank you all for your evidence today. I also thank Susan Love and the FSB for their written evidence, and I look forward to receiving written evidence from the other two organisations represented on the panel.

I suspend the meeting briefly.

11:24

Meeting suspended.

11:29

On resuming—

The Convener: Agenda item 2 is the second panel on the Procurement Reform (Scotland) Bill. We will hear from representatives of social enterprises and the third sector.

I welcome Pauline Graham, who is vice-chair of Social Enterprise Scotland; Annie Gunner Logan, who is director of the Coalition of Care and Support Providers Scotland; Niall McShannon, who is managing director of Clydesdale Community Initiatives; and Duncan Skinner, who is chair of Glencraft.

I start the session by asking: do you think that the bill will deliver the policy objective of establishing

"systems which are transparent, streamlined, standardised, proportionate, fair and business friendly"?

Who would like to start?

Duncan Skinner (Glencraft): I am happy to start. The answer is no for the business that I represent. Glencraft is a small social enterprise with 45 people and a turnover of £1.4 million.

The Convener: As Glencraft is in my constituency, I should probably declare an interest.

Duncan Skinner: Indeed.

Unfortunately, our contracts do not exceed the £50,000 threshold, so they do not in general come within the parameters of the bill.

Expanding on that, I think that the 96 per cent of public procurement that is incorporated in the bill—based on previous procurement statistics in the paperwork that was handed out—and the £5.75 billion that therefore comes within the parameters of the bill will in general include some of the products that we supply. However, they get wrapped up in a single procurement from a larger company, and companies such as mine do not get the chance to participate in those larger contracts. That is a significant flaw that is not addressed in the bill in any way.

I suggest that something should be done in the bill about the public procurement elements that could be supplied by supported workshops, supported businesses or social enterprises that supply smaller individual products within a larger procurement. For example, there could be a percentage of the value of any single one-stop-shop procurement contract that has to deliver not only community benefits but a certain amount of business with social enterprises in the bid. Try as we might at Glencraft, we cannot get people to speak to us about that. I do not know where they get their mattresses from, and I am worried about the certification, supply chain and condition, for example.

In short, the answer is no.

The Convener: Okay. We will probably come back to that.

Pauline Graham (Social Enterprise Scotland): A lot of good work has been done through the reform programme on streamlining and levelling the playing field for the social enterprise suppliers whom I represent, and I see the bill as an extension of the progress that has been made on supplier engagement initiatives and process issues. For example, having a system for the standardisation of PQQs is good. The PQQ was one of the biggest barriers to getting through to the next phase of a procurement for social enterprise suppliers, which are pretty small. The standardisation of PQQs and the mandating of all contracts to be on PCS are incredibly helpful.

In addition, there is the idea of contracts registers in the bill, and the idea that suppliers can have sight of what procurements are being planned. Forward purchasing plans mean that smaller suppliers can be more procurement ready and more ready to respond to the opportunities that are coming down the line. There is also the idea of using community benefits. Obviously, that must be on a case-by-case basis and be proportionate to the value and components of the contract.

I think that all of those component parts will go some way to realising the bill's policy ambitions.

The Convener: I like the concept of a forward purchasing plan. Do you see that being in the procurement strategy that the organisation has to publish?

Pauline Graham: I would hope that it might be linked to that. There should be a commitment in the strategy that the organisation would do that. As part of the contract register—the register of what contracts have been awarded—I would like to see what contracts are being planned.

The Convener: Through its infrastructure investment plan, the Government has tried to show what the pipeline of work is. Are you saying that you would like to see something like that from other contracting bodies?

Pauline Graham: Yes.

Annie Gunner Logan (Coalition of Care and Support Providers Scotland): The answer to your question is yes and no, convener—as always.

I am here to represent the third sector organisations that provide social care and support across the board to children, families, disabled adults, people with learning disabilities and older

people. In our part of the forest, public procurement gets something of a bad press because of the nature of competitive tendering in social care and support, and some of the impact that that has had, which I can go into.

The Convener: Jim Eadie has a specific question on that issue, so we will come back to it.

Annie Gunner Logan: In general terms, the bill goes some considerable way to addressing some of the more acute issues, but it could do a lot more and we have some quite specific asks of the bill in relation to our particular part of the supply chain.

Often when I am before a committee I say that I am not there to indulge in special pleading, but today I am here to do that.

The Convener: I hope that you will be able to get all your pleas into this session.

Niall McShannon (Clydesdale Community Initiatives): I sit in the yes and no camp, and I sit in a couple of different camps as well.

We contract for construction and landscaping-type activities and we have found the use of PCS to be extremely good and positive, but I agree with Duncan Skinner on larger contracts. If there is a one-stop shop and there are subcontracting issues in a large public contract, it is very difficult to see the opportunity for a smaller organisation to access the process and deliver a service.

The community benefit clauses, which you would think would be an opportunity to address that issue, can often be quite vague. There is a lack of creativity in them and a lack of understanding about their potential to engage with social enterprises.

The Convener: Mary Fee's question might be able to probe further into what Duncan Skinner was talking about.

Mary Fee: I want to carry on the theme of how the bill will assist social enterprises and third sector organisations to bid for and win contracts. I accept that there is a range of views across the panel as to how successful that will be.

We have heard in previous evidence that the bill is seen very much as an enabling bill. Do amendments have to be made to the bill to encourage your organisations or ensure that they are part of the process, or should something be put into the guidance?

Duncan Skinner: To be perfectly honest, I would prefer to see both. The bill's intent is commendable—there is no question about that. The problem is the execution, interpretation and, in some cases, the manipulation of the words in practice.

We have had article 19 of the European public procurement directive and other such legislation, which has been based on commendable thoughts. We have had framework agreements in place; in fact, Glencraft have had a national framework agreement to supply mattresses to national and local government for 18 months. Having won that tender 18 months ago, we have had not one single inquiry, so it is not working in practice. I suggest that anything that can be done to mandate the mechanical putting into practice of the bill's good intents should be done.

Niall McShannon: As somebody who goes for tenders and contracts, I am fully in agreement. We see the contracts coming up and we have won a number of contracts—some quite large—off PCS. However, that has been purely on the basis of quality and price. The additional community benefit has not played a part in any contract that we have won to date.

Mary Fee: Should community benefit clauses be beefed up?

Niall McShannon: Absolutely—on two levels. First, they could be much more creative. I can see the difficulty for an agency that commissions a big construction project—what does it know about health and welfare? It is a serious ask for it to take into account how a building project could benefit the local population's health. The agency would be required to work in partnership with local health services or social services to generate the creativity.

Secondly, if a contract is large, the effect gets diluted at the subcontract level. A major construction company might have no expertise in or knowledge of health and welfare issues so, when it looks to fulfil a community benefit clause, it picks the easiest option, which is to work with a regeneration company to do what would probably have been done anyway rather than to seek a social enterprise that might produce more specialist outcomes.

Annie Gunner Logan: I will answer Mary Fee's question in two parts. Larger third sector organisations are already significantly involved in delivering public contracts for care and support. Up to a third of all publicly funded provision is in the third sector's hands, so access to the market is not the issue. However, because of the rates that are on offer, the issue for a number of those organisations is—to be frank—whether they will stay in the market. We might well come back to that in discussing section 24 and other aspects of the bill. The ratio of cost to quality when contracts are awarded is significantly problematic for us.

For smaller organisations that are support providers, access to the market is still an issue. That is because of the burden on tenderers to fill

out immense applications—Duncan Skinner is smiling, as he knows all about that. Bidding for a public contract involves rigmarole and a large amount of paperwork. In our experience, the contract is often awarded to the organisation that writes the best tender and not necessarily the organisation that provides the best service. How does a paper-based exercise discriminate between those two categories? There is a load of issues in how to assist the third sector in accessing the market and being more effective in the market, which is a slightly different issue.

Mary Fee: Another thing to think about is that the bill tries to encourage innovation. Third sector and voluntary organisations are often the most innovative, but they miss out. Should that be built in and included in guidance? It could almost signpost people to your organisations because you add value.

Annie Gunner Logan: The issue is the extent to which a competitive tendering exercise can unlock an organisation's innovation potential, as opposed to asking people to provide something that has been specified in advance.

Mary Fee: You are talking about something other than a paper exercise.

Annie Gunner Logan: Yes—exactly.

Pauline Graham: Social enterprise suppliers will be willing and able to enter the public procurement market and deliver a good-quality service only if buyers engage with them. That relates to Mary Fee's point about innovation.

There is not enough market engagement between buyers and suppliers. With support from the Scottish Government, we have tried for some time to bring together buyers and suppliers and to break down cultural and organisational barriers, so that people understand where social enterprises are, what they sell and what the quality of their product or service is. That applies particularly when a social enterprise has not had a contract or any engagement with a local authority or the NHS. Market engagement is important at the front end.

The sustainable procurement duty in the bill is fine, progressive and laudable, but two points are important when that translates into procurement strategies and reporting against them. First, sustainability needs to be at the heart of the plans and strategies, but it is diluted a little. Guidance on what a good sustainable procurement plan looks like should have sustainability issues at its heart.

Secondly, when it comes to reporting against those plans, there has to be some accountability as regards whether people have delivered on sustainability. Procurement people are very good at procurement, but how they wrap up sustainability into a procurement exercise is quite new to them, so they need some guidance. I, for one, do not want to put any more burden on procurers, but they want to work with our sector—they are very willing to engage with it; they just need some tools and some leverage to enable them to do that. I would like sustainability in its broadest sense—including social enterprise supplier issues—to be at the heart of the guidance on the strategies.

11:45

Mary Fee: Last night, there was an event for businesses in Parliament. At the table that I hosted, there was a discussion about how to include small businesses, including third sector organisations and small enterprises. One of the suggestions that was made was that, if larger organisations that bid for contracts had better local knowledge of the organisations in their area and what services they provide, they could just put contracts directly to small organisations that provide good and innovative services without having to go through a system of subcontracting, which would encourage greater participation of organisations such as the ones that you represent. Would you agree?

Duncan Skinner: That presupposes that the larger organisations speak to organisations such as ours in the first place—but, yes, that is exactly what is required.

When we talk about commercial innovation, relationship building between the public sector and the private sector and between the private sector and the third sector is vital. I come from an oil and gas background, where we did that all the time. Companies such as the Wood Group and the companies that I worked with were large contractors that contracted directly with the likes of Shell and BP. It was incumbent on us to have strong links with our supply chain, on which we were reliant for 80 per cent of the value of our contracts.

My current predicament at Glencraft is that, in my experience, we do not seem to get that, but I would certainly encourage the education of large contractors that get large contracts through public procurement tendering to come to some kind of simple agreement with us, such as a framework agreement or a relationship whereby we could act as a single-source supplier. They could do that just by talking to us and by coming to look at our factory to see the corporate social responsibility potential that exists and the potential for development of their people by gaining an understanding of a third sector organisation that is staffed by disabled people. In that way, they would be humbled into giving us business and allowing us to compete, as we do every day in the open

marketplace, against other manufacturers of the same product.

Mary Fee: How could that be included in the bill? Should it be in the guidance?

Duncan Skinner: The bill does not cover the supply chain as such in as much detail as it might do. That could certainly be dealt with in the guidance. As I mentioned earlier, some kind of direction or a particular percentage or allocation in large-scale procurement, similar to what happens with community benefit clauses, should apply to third sector social enterprises. That would mean that large companies would go looking for a relationship with social enterprises because they would know that they would not succeed without having that element in their tender.

Once a large organisation established a relationship with a good company, it would not have to look again. It would automatically include that company and its prices as part of an on-going relationship. Such an element of compulsion might lead to long-term relationships and solve the problem.

Pauline Graham: The importance of community benefit clauses should not be underestimated in this discussion.

We have really good examples of the social enterprise and small business engagement that Duncan Skinner has outlined working with big contracts. I was involved in supporting a large contractor that won a contract for part of the Government's energy assistance programme, which included specific community benefit clauses. There were good reference points for that, and I was one of those reference points. At the bidding stage, contractors had somebody to phone to say, "I want to work with your suppliers—where are they?" We gave them access to a register of social enterprises, which made it much easier for all concerned—the suppliers, the contractor and the buyer—to understand what the response to the community benefit clause would be.

When the contract was won, the contractor got into a room with social enterprise suppliers in the energy assistance field and said, "We want to work with you." That meant that we did not need to go through a tender process as such. It was a transparent process, but it did not have to go under the procurement regulations.

That was a positive experience, and I would like to see more of that. The bill requires community benefit clauses in major contracts, but I would like it to be beefed up a little and for there to be something about permission to use community benefit clauses.

I do a lot of work with procurers on that. Many procurement officers throughout Scotland already use community benefit clauses. They adopt a policy on those clauses, which gives them permission to use them more and to embed consideration of them in all that they purchase so that the approach is business as usual. I would like the bill to be beefed up a little to encourage that approach.

Duncan Skinner: That work with community benefit clauses is exactly what we want to parallel with social enterprises or supported businesses. Why should we not do that with third sector supply? That would encourage more third sector participation in industry. There is certainly a great need for not-for-profit organisations to support lots of people, to innovate and to become a larger part of the public spend by being able to compete on a level playing field.

Niall McShannon: As the managing director of a construction company, I completely agree with Duncan Skinner and Pauline Graham and I see reasons for optimism if we can beef up the community benefit requirement in the bill to include the supply side.

As the managing director of a health and social care organisation, however, I am much more sceptical about whether that would work. From what I have seen in the past 20 years of working in social work, the large voluntary sector organisations have become contract-winning machines, and the capacity to engage with them in innovative and flexible services is practically non-existent. The phrase that I often use is that there are notable exceptions, but they often become public sector-lite. The contracts that are issued rarely see the benefit of the innovation and flexibility that smaller third sector organisations can bring.

Mary Fee: Is the only way that we could resolve the issue to have something in the regulations so that a percentage of the work must go to smaller organisations?

Niall McShannon: I am not even sure that that would work because, as Annie Gunner Logan said, although those large organisations are winning contracts, they are doing it largely on price. If one of them asked me to deliver a service, I am likely to say that, at that price, I would not be able to deliver the quality that my board insists on and that my participants and clients require.

Mary Fee: So there is too much focus on price and we should look at other things.

Niall McShannon: Absolutely.

Annie Gunner Logan: If only it were true that there are contract-winning machines.

There are alternate models of procurement that can help to facilitate the kind of approach that we are talking about. Pauline Graham and I have been looking at public social partnerships, which lift the service contracts out of the competitive tendering machinery and require organisations to collaborate in the performance of a contract rather than to compete for it. In those models, we often find that the smaller organisation can access the market more effectively.

We are still in the early days with the model, but it enables a much more holistic view in the sense that it does not ask for organisations that all do the same thing to compete with each other; it asks a range of organisations that all have different inputs at particular points in someone's care journey to play their role effectively wherever it might be. There is lots of potential with such a model, but in order to make it more effective we have to do something about the rush to compete everything, which is one of the main issues that we are facing.

Mary Fee: It is not an easy problem to solve.

Pauline Graham: As Annie Gunner Logan said, we are involved in developing and supporting public social partnerships. As part of the Government's change fund process, it has adopted the PSP model. There are also some strategic public social partnerships that, as Annie said, give us a chance to do a proper co-production. The public sector and the third sector providers come together to redesign a service specification and pilot it over a period of time. It goes to competitive tender at the end of that process.

The model is very innovative and it is specific and unique to Scotland, I am proud to say. Although we do not have all the answers, there is a real opportunity to reference public social partnerships and some good examples to date within the guidance or the implementation of the provisions in the bill. It is a matter of giving procurement and commissioners the permission, almost, to not go straight to retendering a service but to stop, review it, and reflect on it, and then to work with third sector providers to design a better service. The biggest advantage with PSP is that service users are at the heart of the process, which we do not see in the current regime in Scotland.

Mary Fee: Taking into account everything that you have said, are the proposals in the bill clear and easy to understand for third sector organisations, including the different levels of procurement within the sector?

Pauline Graham: Yes.

Annie Gunner Logan: Yes.

Niall McShannon: Yes.

Duncan Skinner: Yes.

Mary Fee: A simple question; that is good. I like that.

The Convener: Before we move on, I would like to have something clarified. Social enterprise and the third sector involve myriad different organisations. What they really want is to be seen as organisations that can compete with the private sector for public sector contracts. There is also the separate issue of community benefit. A body that can tender for public sector contracts is involved in both because it can also come under the community benefit remit. I do not mean this in a derogatory way, but such organisations do not always want to be considered as being a community benefit; they should be seen as bodies that can contract and compete with the private sector. Is that correct?

Duncan Skinner: Yes. It is a very good point. We do that all the time because we do no business with the public sector. We would certainly like to increase our employment and grow our business through doing good business with the public sector. We need to guard against sweeping people into a corner and calling them supported workshops or blind asylums, as they used to be called.

However, there is a balance to strike. There is a social dividend to be paid when operating with us, because our people cannot produce as quickly or efficiently as they can overseas and so on. We should recognise that there is a social dividend for doing what is right in Scotland and sticking to our values and working with those who are less privileged—giving them dignity through work. That is worth a lot to our people and it should be worth a lot to Scottish procurement policy.

12:00

The Convener: Yes. For example, when Jim Eadie and I took evidence in Inverness, we heard that the catering provider for the workers on the new campus is the Calman Trust. We will need to go back and check whether the Calman Trust won that work competitively against private contractors or whether it did so under the community benefit clause of that contract. Those are the kind of things that your organisations can be involved in.

Jim Eadie: I want to stay with the issue of procurement and social care that we have begun to discuss this morning. I am mindful that the Health and Sport Committee, which has conducted a range of inquiries into the subject, has highlighted the importance of good commissioning in procurement practices as a driver and determinant of quality. You began to touch on the tension between price and quality. To kick off, what opportunities do you see arising from

the bill in relation to its impact on social care provision?

Annie Gunner Logan: We have two issues with social care and competitive tendering in particular. The starting point has to be that care and support is often a long-term arrangement for individuals. If the procuring authority feels under pressure to retender a contract every two or three years, it creates a climate of instability and disruption—individuals have no idea who will be supporting them after the retender and the care and support staff have no idea who they will be working for, in effect, after the retender. You get cyclical instability. As regards the interests of this committee, the disincentive that that offers to suppliers to invest in their service or in their workforce is very strong if they think that it will just pass to another supplier in a relatively short time. It is also in direct conflict with the Social Care (Self-directed Support) (Scotland) Act 2013, which was passed earlier this year—by this very Parliament, no less—and which wants decision-making power to be placed in the hands of the individual service users, not in the hands of the contracting authority. There are all those problems going on.

The second issue is the impact on quality—I hate to use the phrase "race to the bottom"; it is not that, but a lot of organisations are being dragged to the bottom. It comes back to my point that a paper-based procurement exercise is in our view structurally incapable of determining service quality or a provider's capacity to deliver it, so, inevitably, cost becomes the dominant factor. It is not necessarily the contracting authority that wants it to go that way; it is just how the system works.

Our worry is that rates for care and support are plummeting to the point at which payment of the living wage becomes almost impossible—I suspect that we might get on to that later on. In some cases, payment of the minimum wage becomes pretty difficult within the rates that are offered.

Jim Eadie: Is that because of the pressure on local authority budgets—on the budgets of those that are seeking to procure the service?

Annie Gunner Logan: Yes, but it started even before that, I have to say. Competitive tendering in care has been happening for decades in some respects. However, since the publication of the Public Contract (Scotland) Regulations 2006 (SSI 2006/1), which is when the EU procurement directives came into play, authorities have felt under much more pressure to retender and to do so much more regularly. Whether they wanted to or not, the effect of the competitive tendering process in care is to drive prices down.

Our concern is that we have now got to the point where the skills and capabilities of those who procure—I am trying to say this in a way that does not sound overly critical; on the other hand, why the hell not? There are commissioning authorities that do not understand the cost of delivering a service and think that the way in which the cost is made up is entirely the supplier's issue to worry about. We are at risk of driving down quality. We have already driven down terms and conditions for the workforce, which is starting to have an impact. In a survey that we have just done of all of our members, 84 per cent of them said that they are now looking at care and support contracts and saying, "I am not going there". As Niall McShannon was saying, you cannot guarantee the quality of service that you want for the price that is on offer.

Jim Eadie: The workforce issues that you have mentioned, in relation to the minimum wage and the living wage, go against the intentions of the legislation. Does the bill present an opportunity to go against the trend that you have just described? For example, on quality, is there an opportunity to further strengthen the regulatory regime, perhaps by extending the Care Inspectorate's powers of inspection and intervention, or is that not really the issue?

Annie Gunner Logan: Information from the Care Inspectorate about the quality gradings shows that third sector care and support is streets ahead of the private or public sectors. We are already there. However, the Care Inspectorate has concentrated on the quality of the service, not the inspection of the quality of the commissioning process. That is what we want the Care Inspectorate to do more of.

I do not think that that can be done through this bill—I have my eye on the Public Bodies (Joint Working) (Scotland) Bill in that regard, as that is where I think that the role of the Care Inspectorate can be brought in. What is important about this bill is the sustainable procurement duty and how authorities can not only look to improve the economic and social wellbeing of the area but benefit the recipients of the service that is the subject of the contract—I would add an amendment to the bill to that effect if I got my hands on it. Section 24 is also important. It has the potential to cover guidance on things such as the living wage, zero-hours contracts, treatment of the workforce and so on, which could all go a long way towards helping with some of the problems that are faced.

Our primary objective in relation to this bill is to have care and support contracts taken out of the scope of the requirement to compete.

Jim Eadie: And that is something that the bill could achieve.

Annie Gunner Logan: Yes.

Jim Eadie: Would that require there to be an amendment to the bill, or would that be done through guidance?

Annie Gunner Logan: You could probably do it through section 4, on excluded contracts.

Jim Eadie: So we can expect to see some amendments.

The Convener: Would that help you?

Annie Gunner Logan: Yes, it would. I am aware that it sounds kind of—

The Convener: If those contracts were excluded, there would be no regulation for local authorities or commissioning bodies to meet the requirements of the bill in terms of the living wage and so on.

Annie Gunner Logan: You would have to do it in such a way that you excluded social care contracts from the requirement to advertise and compete but included them for everything else. In other words, you give much more discretion to local authorities about whether they advertise and tender a social care contract but state that, when they decide to do so, the provisions of the bill apply.

I see that I have stunned the committee.

Jim Eadie: I am not easily stunned, as you probably know, but, perhaps for the first time, I am stunned.

I would be interested to know what the other witnesses have to say on that.

Pauline Graham: It might not surprise Annie Gunner Logan to hear that I fully support what she has just outlined about having a much lighter regime for care and support contracts. Some of my members have complained about the things that she has underlined, such as the issues to do with overprocuring. There are implications concerning the Transfer of Undertakings (Protection of Employment) Regulations as well, and nobody seems to think enough about the end user of the service having to change provider all the time. As Annie Gunner Logan said, we are usually talking about a long-term package of care.

I fully support a lighter regime. If that happened through an exemption clause, that would be fantastic. As Annie Gunner Logan said, the issue is about giving local authorities more discretion to stop and think about why they are retendering a service that is working well. It might also get them to think much more strategically about evaluating the services that are provided by the incumbent provider. That would be helpful in terms of the service quality, which we have mentioned quite a lot.

In the context of self-directed support, services need to be delivered differently, and providers, procurers and commissioners need to be up for the challenge when individuals choose the type and quality of care that they want.

Annie Gunner Logan: I should perhaps advise Jim Eadie at this point that the text of the revised European Union public procurement directive is very much in line with what we have said. It establishes a much higher threshold of—I think—€750,000 for social services contracts, which a lot of current contracts in Scotland would breach. It does not lift them completely out, but it says that social services contracts should be subject to a much lighter-touch regime. The guidance that was published in 2010 by the Scottish Government and the Convention of Scottish Local Authorities gives authorities much more latitude on whether they will retender again and again or just roll contracts forward where there are no performance issues. However, I think that the bill gives us the chance to give that a bit more welly. The committee heard from the previous panel today and perhaps from other witnesses that there is guidance coming out of our ears on a lot of issues but it does not have enough force behind it. However, the bill would be able to provide that. It might have sounded a bit outlandish to lay that on the table before you this morning, but that is the direction of travel that we are on in social care.

Jim Eadie: So we might not have to push very hard to get the outcome that you seek.

Annie Gunner Logan: One can always hope.

The Convener: Given what I heard at the Parliament event for businesses—Adam Ingram was at a different table from me—is it not the case that some local authorities in particular regard your sector as a soft option? In other words, they would not treat private contractors in the way in which they treat third sector organisations; for example, with the private sector, they would not get away with retendering more often and driving down prices more often.

Annie Gunner Logan: In terms of competition, they probably would not. We compete with private sector organisations for the contracts, but we mainly compete with each other, which can be a very destructive business. There are ways in which post procurement for the third sector is treated differently. I am thinking in particular of local authorities that want any surplus on the contract given back, which I think some private sector organisations might have a conceptual difficulty with. That is expected of the third sector. I would not say that it is really part of the procurement process, although in some cases contract clauses stipulate it. I think that most private sector organisations would have a very

short answer for a local authority that wanted to do that, but we seem to give in.

The Convener: Perhaps I can bring in here an issue to which Niall McShannon alluded, which is that we have heard that the third sector often has problems with Scotland Excel and the fact that contracts are bundled together on a national basis. When we had Scotland Excel at the committee, it refuted any suggestion that I made that it worked against localism. Can you comment on that?

Niall McShannon: All that I can tell you about is my experience, which is that it is extremely difficult to introduce a new social care product to the market. We run a landscaping company that we use as a platform on which to deliver health and social care training and employability. It does not tick a mental health box, but it has mental health outcomes. It does not necessarily tick a day care box for adults with learning disability, but it is an alternative to day care services.

The big issue for my organisation is that, by the time health and social care contracts come to the procurement end, the specifications are drawn up such that we would be excluded on two fronts. First, we probably would not have the capacity because we are a small, local organisation. Our capacity for health and social care is dependent on us growing a landscaping business, which makes life a bit tricky. Secondly, the specifications are too broad and there is no box for social enterprise-based health and social care outcomes.

12:15

Annie Gunner Logan: On Scotland Excel, specifically, there are not that many national contracts for social care. There is one on fostering and one on secure care, and there is one in development on residential care for children. The issue for many third sector organisations is not necessarily to do with Scotland Excel; it is about who is doing the buying, what they are buying and whether those two knowledge sets coincide. We see that within local authorities. Corporate procurement is in charge of letting contracts for social care, but the knowledge about social care among the people who are running the procurement is zero. At the same time, social work services departments let contracts for social care, but their knowledge of procurement is not great either. The key issue is how we marry up the skills and capabilities.

For most third sector organisations, the key issue with the residential childcare contract is that it excludes 40 per cent of the market, which is the in-house delivery. It is an exercise that is supposed to be about driving up quality and addressing capacity issues, but it applies only to external providers, who are 60 per cent of the market. None of its provisions apply to the local authorities that deliver directly. As a commissioning exercise, it is missing almost half the services that require attention. That is where the issue comes up with Scotland Excel.

Alex Johnstone: I want to move on to the thresholds for contracts. Do you support the introduction of the new regime for contracts that are below the EU threshold? What will be the implications for your sector?

Duncan Skinner: I think that I have already given my answer. It is imperative that the quite significant gap from zero to £50,000 is somehow bridged for small businesses, or at least considered in the bill. Otherwise, it will be abused or forgotten about through the use of procurement cards and totally unregulated procurement, of which I get none. It is not working for me and I cannot say that the bill, as it stands, does anything to help that. The thresholds for larger procurement make perfect sense to larger companies, but they do not speak to SMEs and small providers.

However, as I said earlier, a lot of the products that small providers can and do supply are included in the £5.75 billion—the 96 per cent of public procurement. It is just that it is all hidden and is rarely accessed by third sector companies. I cannot make that point more strongly.

Annie Gunner Logan: This relates to what I was saying about the way in which the EU principles of non-discrimination and equal treatment of suppliers are interpreted by authorities to mean that they have to go through a cyclical process of retendering every two or three years. The bill applies those principles to any contract worth more than £50,000, so the pressure on local authorities to retender relatively small-value contracts in social care will increase rather than decrease, which is what we want to happen. It is not inconceivable that a care package for one individual might exceed the £50,000 threshold. The EU threshold would not be exceeded because €750,000 is a lot of money, but exceeding £50,000 in social care and support for people with complex needs is not unlikely.

Unless we exclude social care contracts from the requirement to advertise and compete, we might end up having to retender individual support packages every two or three years, with all the impact on disruption, continuity and instability that I have mentioned. That is my worry about the threshold; otherwise, it is entirely reasonable.

To marry that up to the self-directed support legislation makes it even more complicated. Authorities are trying to make sense of the EU principles and their duties under procurement legislation with their duties under self-directed support legislation. Many are doing that by letting

a framework contract from which individuals can then choose their provider. That is completely contrary to the spirit and probably the letter of the self-directed support legislation because a person is being told that they can choose any provider that they want, as long as it is from a list that local authorities have pre-specified through a framework contract. For all those reasons, I am pressing for the removal of care contracts from the requirement to compete. The threshold becomes significant if you look at it in that way.

Alex Johnstone: The choice has been made about the level at which the thresholds will be set. Are the thresholds in the right or wrong place? Do you have alternative suggestions?

Annie Gunner Logan: The threshold seems very low for social care contracts, unless we find a way of giving authorities more latitude around the principles.

Pauline Graham: I probably agree. In some senses, with that £50,000 threshold, the market is opened up to competition and that must be a good thing. However, that must be caveated by Annie Gunner Logan's point about care and how people will be made more risk averse, so they will just go through the process rather than be risk pragmatic in their procurement. The wording around the threshold matters, but generally I do not have an issue with the threshold.

Niall McShannon: I wear two hats. As a construction manager, I think that the threshold is reasonable and should have a positive consequence; as a health and social care person, I agree that the threshold could cause problems by returning us to a cycle of overprocurement.

Alex Johnstone: I am interested to hear that there is a range of views on the subject and that some of them are quite complicated. Prior to the bill's publication, were you consulted by the Scottish Government on the general issues and those that relate specifically to the thresholds? Did you get the chance to have your say?

Annie Gunner Logan: We have had very positive engagement with the Scottish Government's procurement directorate on the matter. Pauline Graham and I sit on the public procurement advisory group, which is an excellent body that has given us a lot of say on behalf of our constituency of membership in the development of the proposals.

What was consulted on in the pre-bill consultation is not what has ended up in section 8. A duty to be proportionate, transparent and so on was consulted on; the EU principles were not put into domestic legislation; and I do not think that a specific proposal on thresholds was consulted on. People's views were sought on the latter, but a £50,000 threshold was not included and people were not asked what they thought about that level. It is not the threshold itself that worries me but the translation of the EU principles into domestic law, which is the driver for all the retendering that we have seen. That gave me the willies a bit when I saw it, as that was not part of the consultation.

Alex Johnstone: That is remarkably similar to a view that we heard from the business organisations earlier. Does anyone have a similar or different view on the consultation process?

Pauline Graham: It was very positive. I am on the public procurement advisory group, which continues to be engaged with the bill process, and I am on the supplier engagement working group, which brings together private, public and third sector colleagues. Annie Gunner Logan and I were also involved in the bill's sounding board and a separate group that looked specifically at social and environmental measures. We have been heavily involved—I guess that that is why we have been invited here today—and we feel that we have a vested interest in getting the bill right.

Duncan Skinner: I would not have expected such a small business as ours to be consulted, so I appreciate the invitation to give evidence today. As a third sector or social enterprise, we might have merited a note to make us aware of the provisions in section 10, which refer to social enterprise. However, the first thing that we got, last week, was an invitation to come here. I fully understand that we are a very small element and that the proper social sector organisations have been consulted on the bill. I am fine with that.

Niall McShannon: We were consulted, but through Social Firms Scotland and Sense Scotland.

Alex Johnstone: Thank you very much. I look forward to raising the issue with the minister at a later date.

The Convener: We move to general duties and procurement strategies.

Gordon MacDonald: Earlier we touched on the sustainable procurement duty, which states that a contracting authority must consider how it can improve the economic, social and environmental wellbeing of its area; how it can facilitate the involvement of third sector bodies and supported businesses in the process; and how it can promote innovation. Do you think that the bill will achieve those aims? If not, what barriers are preventing us from achieving those objectives?

Pauline Graham: I might be in danger of repeating some things that I said earlier, but they are important in the context of your question. I very much welcome the sustainable procurement duty. I wanted to see sustainability at the heart of the bill, and I was a bit noisy when the bill changed

its name from “sustainable procurement” to “procurement reform”. Can the bill achieve its ambitions for sustainability? Yes, if it is policy driven. Individual authorities that come under the regulations will need to think about their procurement policy outcomes and how they buy or commission anything. For me, it is about policy adoption and people starting to think about what their organisation is there for, whether they are a local authority that serves citizens and a geographic area or an NHS board that is focused on health improvement and treatment.

The process must be policy driven, and I would like the guidance around how that duty translates into strategies and reporting against those strategies to consider the clear links with the buying authority’s policy objectives and the national performance framework so that we can see the duty being translated into national outcomes and local outcomes through single outcome agreements. I would also like sustainability issues to be addressed at an organisational level through the procurement capability assessments. Making those links between national, local and organisational outcomes will go some way to ensuring that the duty is as effective as we want it to be.

Annie Gunner Logan: Section 9 is very good, and I think that it is very important. Public bodies are already under a duty of best value, and section 9 is helpful in starting to articulate what that might look like in relation to the letting of public contracts. As I said, I would add to that a requirement that contracting authorities ought to consider how the wellbeing of the individual recipient of the service in question, rather than just the general area, will be improved. I would want it to be a bit more specific to the individuals who are at the heart of the service.

12:30

With regard to whether the duty will be effective, that will depend—as always with such things—on how it is monitored and who will hold anyone to account for any of it. The idea of having an annual procurement report is important, and that also relates to what the bill says about remedies. I do not know whether we will come to that later, but there is a thread between all those provisions.

Duncan Skinner: The sustainable procurement duty is commendable, but there are further elements that need to be addressed, although they are probably not for this bill. One example is a follow-up audit of the supply chain. Everyone breathes a huge sigh of relief when the tender process for big procurements is finished and the contract is awarded, but I have not seen much follow-up to that—in any industry—in the form of an audit of the supply chain from an ethical and source-of-supply perspective. That is an element that should be expected, given the amount of spend and the scale of contracts. The integrity of those contracts should be questioned and audited from time to time, and we have the resources to do that.

The question of value is very difficult in any procurement situation. In general, the fallback is a decision based on price, and we find that to be the case everywhere in our organisation. We need to be more innovative and advanced in our thinking about what value is. A mattress that lasts five years longer, for example, has a different value from that of a cheap import, but we do not look at that—we just look at the bottom line of price, which is the wrong way to go about it.

Gordon MacDonald: How would you address in practice the balance between cost and quality?

Duncan Skinner: The technical specification in the tender should be there not just for bidding against—it needs to be verified. Again, longer-term supplier-contractor or supplier-procurer relationships with intermittent checks of certification, documentation, quality of process and the treatment of employees are very important, and I would like to see much more of that in public procurement, just as there is in oil and gas and other private procurement.

The Convener: Perhaps the question of whether a product lasts longer than others—I can attest that Mr Skinner’s product does—falls under the section on procurement of recycled and recyclable products.

Duncan Skinner: It probably does, but I will give you an example. We tendered for a massive contract to supply Unite with mattresses for student accommodation earlier this year, which came down to a request from Unite for us to supply a mattress for a student at £36. The material cost of our product is more than £36, and I am not very happy that my son, who is a fourth-year student, is being subjected to that level of price competition, which could damage his health in the long term.

That is the way that our bright young students are being treated, as an outcome of what is really happening in quasi-public procurement. When I spoke to the principals of the universities concerned, they were horrified. Things are hidden and out of control and something needs to be done about what is a very worrying situation. That is just a small example, but it shows that things are not being properly policed and that quality does not come into the decision-making process nearly as much as it could and should do.

Jim Eadie: Who was to blame in that instance? Was it the procurement office of the universities concerned or someone else?

Duncan Skinner: It was the Unite national agreement. Unite supplies many universities, and we were bidding for a national contract. The procurer for Unite came back and pushed us on price and, as a result, we lost the contract. I do not know who won it, but I shudder to think of the quality involved if that is the price that the contract is being delivered at.

Jim Eadie: Thank you.

Gordon MacDonald: Do you see any conflict between achieving the sustainable procurement duty and the general duty to treat suppliers without any discrimination and to act in a transparent and proportionate manner?

Niall McShannon: As Duncan Skinner has said, it all comes down to the specification for the product. If the specification clearly sets out community benefit clauses promoting, say, innovation, flexibility and the ability to use a smaller organisation, I cannot see that there will be a conflict. Conflicts might arise if such clauses are not specified and the contract manager has to fulfil some preliminary obligation and simply goes out and finds someone without giving the matter any real consideration.

Annie Gunner Logan: I can see why this might be a worry. After all, section 9(1)(a)(ii)—here we go; it is anorak time again—promotes SMEs and the third sector, whereas under the general duty everyone is supposed to be treated equally. However, that provision has come about because of the perception that the current arrangements discriminate against SMEs and the third sector. All it means is that part of the duty should include some consideration of how those organisations can get into the game; I do not think that it means that, having entered the game, those organisations will have some automatic advantage over anyone else. In that respect, I am not too worried.

Coming back to my colleagues' comments, I think that we want contracting authorities to be more discriminating with regard to quality products and services and those of poorer quality. Unfortunately, our experience is that the tendering process as it stands is not really capable of such discrimination.

Pauline Graham: That is why the duty is important and why the references to its component parts are welcome. However, something that saddens me is that an earlier version of the bill said that anyone carrying out procurement would have to demonstrate that, in doing so, they would improve the economic, social and environmental wellbeing of the relevant area; we have lost the word "demonstrate" for the rather weaker term "consider". I am not sure that I will win this argument at this stage, but I would certainly like the term to be amended to "seriously consider". If that does not happen, procurers will simply consider the issue and then not do it.

Jim Eadie: What do you consider to be the benefits of placing contracts on the public contracts Scotland website, assuming, of course, that you consider that it provides any benefits?

Annie Gunner Logan: My response to the creation of public contracts Scotland is, "Hooray." As far as suppliers and providers are concerned, having the one portal is terrific. It is just a shame that we have had to put it in a bill to make it happen.

Jim Eadie: That is helpful. We have touched on community benefit clauses. Does anyone have anything to add to what they have said already? Do not feel that you have to.

Pauline Graham: The community benefit clauses references in the bill are fine for major contracts, as are the other references to as and when the Government might decide that certain contracts should have a community benefit element. However, I would also like to mention again permission and the need for encouragement to embed community benefits at the front end. The thinking should be done first and, if community benefits are not being included, we should say why. Reference should also be made to service contracts. There is a big general emphasis on community benefits in construction employment and apprenticeships. I would like to see more encouragement for that in service contracts.

Jim Eadie: Are you happy with the level at which they apply?

Pauline Graham: Yes.

Mark Griffin: What do the witnesses feel about the Government's proposals to address workforce issues, particularly the inappropriate use of zero-hours contracts and blacklisting?

Pauline Graham: We are very supportive.

Annie Gunner Logan: Hooray again, but I want to add something to that. I am looking at section 24 of the bill. It is interesting that the provision has been conceived of as a way of dealing with poor providers. I think that it is a way of dealing with poor contracting authorities.

Our complaint is that a lot of procurement has driven down wages and terms and conditions in the third sector to unsustainable levels. The bill, although the word sustainable is not in its title, does deal with the issue. Providers are bidding at levels that would not sustain the living wage or, in some cases, the minimum wage because of the way in which the tendering process is constructed and because the idea of a short-term efficiency saving is very attractive to a local authority—the

risk is always that an authority will go for such a saving. The bill is a way of ensuring that contracting authorities have specific regard to the terms of engagement of the workforce, including things like the living wage. That is a good thing. The difficulty is that those authorities will then have to find the money to pay for that. As I said earlier, some of our members are looking at tenders and finding that they cannot compete on the price cap that has been put on the tender because they would not be able to pay a living wage to their staff.

I see the proposals as important for regulating the behaviour of not the providers, but the contracting authorities.

Duncan Skinner: I would not be allergic to blacklisting suppliers if they were found wanting in many respects, but not employees.

Mark Griffin: The Government has said that it will encourage employers to pay the living wage, but it has also said that it cannot enforce it through the bill because of European Union rules. What would your opinion be of including a section in the bill that required a contracting authority to enter into negotiations with a successful bidder on how much extra it would cost to pay its employees a living wage? That would mean that it would be more of a policy matter for the contracting authority as to whether it was willing to pay the additional cost. Could that be a way of delivering the living wage? It would be a way of getting around the legal requirement while still having a section in the bill that deals with the living wage.

Duncan Skinner: Would the negotiations be carried out after award of the tender?

Mark Griffin: Yes, post-award.

Duncan Skinner: Not a chance. No, that would just introduce an element of lowballing the bid and negotiating it up later. I would not like to see procurement going that way. A level playing field for the living wage is where I would want to be.

Mark Griffin: I totally agree and that is where I want to be, but the Government is saying that it cannot include a particular section, so I envisage a contract being won on a particular price and the successful bidder then being able to tell the contracting authority how much more it would cost to pay its employees a living wage on that contract. It would then be up to the public authority to decide whether to take that step up or continue with the contract as it was originally won.

12:45

Annie Gunner Logan: There are two points about that. One is that, in the competition, that approach would disadvantage employers who already pay the living wage by favouring the lower price employer. Secondly, the body might find itself in really hot water with the procurement and contract regulations on post-award negotiation. That is not to say that that does not happen. Sometimes, our members win a contract on their quality submission and afterwards are asked to drop the price, which is the process completely in reverse. To me, that process is highly suspect in either direction.

Duncan Skinner: Yes, but that drop in price generally comes out of margin and profit rather than the employees' back pocket. In the world that I come from, the way that it works is that customers dictate the wage agreements that they want in their tenders, so there is no competition on wage costs. The competition is on efficiency, productivity and various other costs, but wage costs are a level playing field. Anything that can be done to encourage that should be done.

Pauline Graham: It is true that the issue is complex. It is an ethical issue rather than one that can be solved with a procurement fix. I think that we all support the living wage across the board. There are complexities in Mark Griffin's suggestion that people would win on price and then be given additional moneys to do something else. That would be difficult for a large provider that has contracts with several authorities—or no contract, perhaps because it delivers things but not through a formal contract agreement. If there are different wage structures across an organisation just because one authority says that the living wage must be paid, that would cause all sorts of problems. It is a complex issue, and it is an ethical one rather than a procurement one.

Duncan Skinner: That raises the question that I mentioned earlier about a supply chain audit. I doubt whether there is ever any follow-up to an audit on supplier wage costs.

Annie Gunner Logan: I will give a quick example of some of the conundrums that providers face in relation to the question. A local authority let a home care contract that said that the authority wanted to encourage its providers to pay the living wage. However, when the contract value was divided by the number of home care hours, it was discovered that it was impossible to pay the living wage within the envelope that was in scope.

I just do not get the idea that we will somehow encourage people to pay the living wage. The whole point of introducing a measure through procurement is to level the playing field for everybody so that there is no longer a competitive advantage from not paying the living wage, as exists at the moment. I am not entirely sure that I buy the idea that it is not possible to do that because of the EU. Certainly, a requirement to pay the living wage cannot be put in the award criteria,

but if section 24 was used to guide contracting authorities on their selection criteria, we might be able to do something about it. However, as I said, the legal niceties are almost a sideshow, because the big issue is finding the money to do it.

Niall McShannon: On a pre-qualification questionnaire that we recently completed for a tender, there were questions about whether we pay the living wage and use zero-hours contracts. Those were in the quality part of the PQQ. I was delighted to see them and I thought that the approach might help us against a number of the competitors to whom we regularly lose tenders. It will be interesting to see how that pans out. I do not know whether that is legal or illegal, so I will not name the specific body that did it, but it can be done.

Annie Gunner Logan: There are some circumstances in which zero-hours contracts are perfectly all right. Many care providers run zero-hours contracts for relief and sessional staff, which is entirely for the convenience of those staff. In self-directed support, for example, you cannot realistically have a situation in which people are saying, "No, I don't want to go to bed at six. I want to go to bed at two," or "I don't want someone on a Thursday, but I would like someone at the weekend," unless you are able to find a way to flexibly match the workforce and the service. Chucking out all zero-hours contracts in our field would be pretty disastrous.

What is a framework agreement contract if not a zero-hours contract? Some of the poorer behaviour around zero-hours contracts on the part of providers is being driven by the market environment, which is going much more towards framework agreements. All that a framework agreement is is one almighty zero-hours contract. If you really want to stamp out inappropriate practice among suppliers, you need to deal with the commissioning and procurement behaviour of the contractors.

Mark Griffin: How do you feel about the proposal to increase transparency by offering debrief information for those who have not won contracts? What depth of information should be provided to unsuccessful bidders?

Duncan Skinner: We got that all the time in my previous industry, but we did not get much value from it. The value is really in the customer conversation up front when it comes to assessing and responding to needs. I do not set much store by the debrief, because unless it is very deep and meaningful it will not change behaviours. People will just move on to the next bid. I would not waste too much time with it. That is my experience

Annie Gunner Logan: We are quite supportive of it, not least because providers are increasingly resorting to issuing freedom of information requests to contracting authorities to release the details of the winning bid, so that they can see exactly how that bid compares with their own. I certainly do not think that that is the way we want to go, so I support a much more detailed debriefing.

I was talking to the Local Government and Regeneration Committee about that, saying that a debrief can expose some of the absurdities in the tendering process. For example, we had a member who was debriefed on their bid and told, "If you had put that information under question 4, we would have been able to allocate a score to it in our evaluation process, but because you put it under question 2 we could not do that, and that is why you lost the contract." It is that kind of thing that debriefs can help to expose.

Duncan Skinner: I agree, but it is not that helpful, and it is very expensive to deliver that backward-looking analysis. If there is something that you can learn that will help your company in future, such as discovering a fundamental gap in your understanding of the tender or in your provision of service, it can be useful, but in my experience in the private sector, a lot of it is lip service.

Pauline Graham: I think that it is important and that the bill covers it well. It is incumbent upon the unsuccessful tenderer, in the main, to ask for a debrief and to ask the right questions when they are in that debrief. It is important that it should be in the bill, and I think that what it says about the debrief is absolutely fine.

Adam Ingram: Is the remedies regime for sub-EU threshold procurement necessary, and are the provisions appropriate?

Annie Gunner Logan: It is all based on court action, and most third sector organisations would have to be pushed pretty hard to take court action. The speaker from the CBI on your previous panel of witnesses talked about the bill moving responsibility for the monitoring of compliance to the provider rather than the sponsoring department of Government. I am not quite sure that I agreed with his remedy, which was to cut the local government settlement in revenge—that was an interesting idea.

The McClelland report recommended some kind of appeal or arbitration process that is short of court action but a bit more powerful than simply lodging a complaint, but that has never been implemented. We have gone some way towards that with the single point of inquiry, which is a helpful service but, for my money, it needs more teeth. We said that in our response to the consultation on the bill. An independent arbiter is

needed; someone who is not a sheriff and not as expensive to access as a sheriff.

Adam Ingram: Some have called for an ombudsman-type person to exist between the single point of inquiry and the court.

Annie Gunner Logan: We would support that, but that is not in the bill.

Adam Ingram: Does anyone agree with that?

Pauline Graham: Probably, yes. I am a member of the single point of inquiry group. The single point of inquiry has been a useful service, although it has probably been underresourced at times, so people have perhaps had to wait a bit longer for a response to their inquiries. I do not know why that has been the case.

The service has in the main been helpful for suppliers. Along with the Scottish Chambers of Commerce and the FSB, our job was to look at the trends in inquiries. The inquiries were generally complaints; nobody came to the single point of inquiry to say that they had had a really good procurement experience. I would like the single point of inquiry to be strengthened or I would support the introduction of an ombudsman.

Duncan Skinner: More transparency in the tendering process and more professionalism should do away with the need for follow-up. Everyone hates losing and is bound to want somebody or some issue to blame. I would prefer resources to be used for continuous audit and follow-up, to ensure that the integrity of the supplier delivery matches what was tendered, instead of wasting too much time on something that probably will not change the original decision—although some fairly major rolling stock procurements have been changed in the past.

Adam Ingram: You have been pretty clear about what you would like to be in the bill that is not in it, such as an exemption. Do you have any other enhancements or asks for the bill?

Annie Gunner Logan: Some good stuff in the 2010 guidance on the procurement of care and support services could usefully be emphasised by being brought into the scope of statutory guidance under the bill. At the moment, that is free-floating guidance that is not under any legislation, which might mean that it is not as effective as it could be. That guidance needs to be updated, but what I suggest would be a useful process.

I would pick out bits of the guidance if it could not be brought under the bill. I am always interested in introducing further duties. One would be for a contracting authority to assess the risks and benefits of any procurement exercise before embarking on it. I suggest that in relation to care and support services because authorities already have latitude on whether to retender an existing support arrangement. They can assess the risks and benefits of doing that for the individual, their family, the workforce and so on, but that does not happen frequently.

Another element is who should be involved in developing the specifications of the service that will be the subject of a contract. It is axiomatic that the individual, their family and the community need to be involved in developing the specifications, but they are still not involved at the moment.

I would go further and argue that providers ought to have some kind of in, not in respect of decision making but by having some scope to offer their expertise with regard to what the service should look like. Otherwise, we just keep retendering with the same specifications, and the scope for innovation that colleagues have mentioned just is not there.

13:00

My last suggestion is lifted directly from the 2010 guidance, which states that contracting authorities must ensure that the price that is tendered is adequate for providing the quality of the service that is required. That does not happen at all. A lot of home care contracts now have a price cap, and we are looking at them and saying, “Really? £10.50 or £11 an hour? Do you really want a quality home care service for that?”

We have challenged a couple of authorities and said, “Help us to break that down—it needs to pay for the staff, compliance requirements, management, overheads and supervision.” The response has been, “Well, it’s the provider’s business to work all that out”, which I think is shorthand for, “We don’t know, but we like the price.”

I would like a much stronger link between price and quality as a responsibility of not just the provider but the contracting authority, particularly in care and support.

Adam Ingram: Okay. That sounds fairly comprehensive.

Annie Gunner Logan: My list?

Adam Ingram: Yes. Are there are any other suggestions?

Pauline Graham: I am not sure that training has been mentioned in any of the committee’s evidence sessions today.

The Convener: Training on both sides has been an overarching theme throughout our evidence sessions, so we will certainly be making a big thing of it.

Pauline Graham: Thank you.

The Convener: Does anyone else want to come in?

Duncan Skinner: I have a small point on the definition of supported businesses and the ability to ring fence a contract to be tendered for by only such businesses. I am not sure whether it would be the case, but there might be instances in which only one supported business is capable of supplying the service. My concern is that a procuring authority might say, "We can't use that provision because we can't establish a competitive environment in that sector, so we'll just not bother."

The Convener: We will definitely ask the cabinet secretary about that when she comes in.

Duncan Skinner: Thank you.

The Convener: That was a really interesting, informative and helpful session, and I thank you all for coming. That ends our business today. The next meeting will be on 4 December, when we will take evidence from two panels on the bill and hear from the Scottish Housing Regulator.

Meeting closed at 13:02.

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e-format first available
ISBN 978-1-78392-206-2

Revised e-format available
ISBN 978-1-78392-220-8

Printed in Scotland by APS Group Scotland