



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

Wednesday 6 November 2013

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INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE
21st 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:

Jim Cuthbert

Margaret Cuthbert

Stuart Greig (Scottish Government)

Paul McNulty (Scottish Government)

Alastair Merrill (Scottish Government)

Duncan Osler (MacRoberts LLP)

Gil Paterson (Clydebank and Milngavie) (SNP) (Committee Substitute)

Christa Reekie (Scottish Futures Trust)

Mark Richards (Scottish Government)

Barry White (Scottish Futures Trust)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

Committee Room 3

Scottish Parliament

Infrastructure and Capital Investment Committee

Wednesday 6 November 2013

[The Convener opened the meeting at 10:00]

Procurement Reform (Scotland) Bill: Stage 1

The Convener (Maureen Watt): Good morning, everyone. I welcome you to the 21st meeting in 2013 of the Infrastructure and Capital Investment Committee. I remind everyone to switch off their mobile devices, as they affect the broadcasting system. That said, some members will be looking at their iPads because we provide the papers in digital format. We have received apologies from Gordon MacDonald, and Gil Paterson is here in his place.

Agenda item 1 is evidence on the Procurement Reform (Scotland) Bill. We will hear first from the Scottish Government. I welcome the witnesses: Stuart Greig, head of zero waste policy; Alastair Merrill, director of procurement; Paul McNulty, head of procurement policy and development; and the solicitor, Mark Richards, who is branch head of commercial and business services.

Who would like to make an opening statement?

Alastair Merrill (Scottish Government): I will do so. I extend our thanks to the committee for agreeing to reschedule the evidence session to this week because a number of our party were ill last week.

I will keep my remarks brief. The Procurement Reform (Scotland) Bill must be seen in the context of the programme of public sector reform that began with the publication of John McClelland's report in 2006. That programme has led to the development of what is increasingly referred to as a Scottish model of procurement, which seeks to maximise the contribution that public procurement can make to Scotland's economic recovery. Central to that model is the concept of value for money as the best balance of cost, quality and sustainability, with sustainability being seen through the lenses of social, economic and environmental sustainability.

In developing the propositions for the bill, the Scottish Government has consulted extensively, formally and informally, with individual stakeholders as well as with groups of interested parties. The resulting bill aims to establish a national legislative framework for procurement that balances a business-friendly approach with the

need to address social and environmental aspirations. In establishing such a framework, the Scottish ministers aim to send a clear message to purchasers and suppliers across Scotland about the standards that they expect from public procurement activity. The team and I will do our best to answer any questions that the committee may have.

The Convener: Thank you. Adam Ingram will start the questioning.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): How was the list of bodies to which the bill will apply drawn up? In particular, why were bodies in the utilities sector, such as Scottish Water, excluded from the bill?

Alastair Merrill: The approach that was taken was to mirror the application of the Public Contracts (Scotland) Regulations 2012 while limiting the application to Scottish public bodies.

The thinking behind that was that any other approach could risk creating confusion in the application of the bill and could cut across the separate European procurement legislation that applies to utilities companies. Paul McNulty might like to expand on that.

Paul McNulty (Scottish Government): Utilities companies such as Scottish Water are subject to a separate European procurement regime under the utilities directive. Because we need to frame the bill so that it will dovetail with European law, if we brought utilities within the scope of the bill we would have another directive to think about. The utilities regime is very different on key issues such as pre-qualification, and if we brought Scottish Water within the scope of the bill we would add a layer of complexity around how we frame the provisions of the bill with European legislation.

We also have regard to the fact that utilities are subject to a lighter-touch European regime specifically because they are regarded as being subject to a degree of commercial pressure. If we brought utilities within the scope of the bill generally, there could be adverse consequences for a number of other utility entities such as, for example, public sector operated port and harbour authorities.

Adam Ingram: Is there not a danger of having two separate procurement regimes running and sending mixed messages to the marketplace?

Paul McNulty: We already have two different procurement regimes. At the European level, there is one that is specific to the public sector, and we have tried to replicate that coverage in the bill. A separate regime applies specifically to public and private sector bodies that operate utility functions, such as water, rail, port and harbour authorities

and airports. There are already two regimes in place.

Adam Ingram: Okay. How were the thresholds for regulated contracts under the bill arrived at and why were the new lower thresholds introduced?

Alastair Merrill: It was in the pursuit of simplicity and in line with good practice and business requests. We took the 2012 regulations as the starting point for the thresholds because they are familiar to public sector purchasers. The rule of thumb was to apply about 50 per cent of the European Union thresholds to the thresholds in the bill. We felt that a round number such as £50,000 would be easier to communicate and understand than a figure that does not end with a zero. Under the existing public procurement reform programme, the public procurement reform board encourages all public bodies to use a full procurement process above the £50,000 threshold, so the lower threshold is in line with that. We also took roughly half the EU threshold as the starting point for works and services.

Adam Ingram: Other jurisdictions use different rules from the 50 per cent rule of thumb. In France, for example, the threshold is set at something like €15,000 as opposed to the £50,000 that you propose. What is the rationale for your figure?

Alastair Merrill: It is a balance of what is going to be business friendly while we introduce the new requirements around the duty of sustainability. We have used £50,000 as the threshold until now although it is at the upper end of the figures in other European jurisdictions. Countries such as France and the United Kingdom propose a lower threshold, but the bill contains provisions to allow the threshold to be adjusted upward or downward in the light of experience. Paul McNulty might like to comment further.

Paul McNulty: We were trying to strike an appropriate balance and not impose unnecessary burdens on the public sector and business. Our discussions with business over the years suggested that around 50 per cent of the European threshold is the level at which it would like to see contracts advertised more widely.

Adam Ingram: What will be the impact on businesses of introducing those thresholds? What feedback have you had from business?

Paul McNulty: We hope to get much greater visibility and transparency of contract opportunities in the lower price bracket, which will be of particular interest to small and medium-sized enterprises. Below the £50,000 mark, the cost of running the process starts to make it impractical to advertise.

Within the public contracts Scotland advertising portal, which is Scotland's national portal for contract opportunities, we have a system of obtaining very simple, quick quotes. It is called quick quote and it allows purchasers to invite companies—local companies, if that is their preference—to submit a secure quotation online.

There is a degree of process that applies at the lower end of the spectrum for lower-value contracts.

Adam Ingram: It is not entirely clear that you consulted business on your proposals. What consultation did you undertake with stakeholders in setting the thresholds, and what feedback have you got from business?

Paul McNulty: We covered that in a number of different ways over the years, including in discussions at the public procurement reform board, which covers the wider public sector, in discussions at the public procurement advisory group, which is part of the reform programme governance landscape, and in separate discussions with individual stakeholders.

The feedback that we have got has tended to be generally supportive of the approach to set the threshold at 50 per cent of the EU threshold.

Adam Ingram: Can you tell me which bodies or businesses you consulted?

Paul McNulty: That has been covered in a number of different ways. It might be best if we review the papers and write to you.

Alastair Merrill: We can provide a note on the exact detail of the consultation. The issue has been the subject of considerable discussion with bodies such as the Scottish Chambers of Commerce and the Federation of Small Businesses through the public procurement advisory group as well as through a body called the supplier engagement working group, which is a partnership between public sector, business and third sector representatives that aims to develop practical proposals to address the challenges that they face. We can provide a more detailed note on the consultation on thresholds.

I add that the bill will enable ministers to adjust the threshold in the light of experience should a body of evidence emerge that either a lower or a higher threshold is appropriate.

Adam Ingram: A note would be helpful. Thank you.

Under the bill, how will regulated contracts that are above EU thresholds interact with the European procurement process?

Paul McNulty: The bill will operate in a number of ways. As you will have seen from the Scottish Parliament information centre briefing, not all the

provisions apply above and below the threshold, which has been one of the complexities of the bill. We have worked very hard to make sure that the bill dovetails with Europe and we are confident that it does.

One of the reasons why the bill focuses principally on enabling powers, however, is that we have not yet adopted the final EU directive. The timetable for that has slipped—it was originally expected to happen at the end of 2012 but the directive will now not be adopted until January 2014 at the earliest. Contained in that new EU public procurement directive are a number of significant options—implementation policy choices—for member states. A lot of the detail of what we intend to do through the bill will have to be framed and developed in the light of those policy options. In the bill, we have the flexibility to adapt to both the final directive, which we expect next year, and on-going developments in European law.

10:15

Adam Ingram: On the social and economic development objectives of the bill, is the intention that the Scottish ministers will have powers and the contracting authorities will have duties to implement the guidance that the Scottish ministers might introduce?

Paul McNulty: We expect the bill to give us the flexibility to adapt our approach in the light of any further flexibility that Europe grants us.

Mark Richards (Scottish Government): I can give an example of the way in which everything fits together.

Section 8 on “General duties” reflects the general principles of EU law regarding equal treatment, transparency, non-discrimination and proportionality. Those principles are already reflected in the 2012 regulations and they cover EU-regulated procurements. One of the measures in the bill applies those same duties to the lower-threshold measures—that is how the two will fit together.

However, there is no equivalent to the sustainable procurement duty in existing EU regulatory documents. The sustainable procurement duty will therefore apply to all procurements that are above the threshold set by the bill, including those that are currently subject to EU regulation.

There is a synergy between the two. In effect, we are putting pieces of a jigsaw together where there is existing provision in EU law and we are overlaying other provisions where there is no existing provision in EU law.

Adam Ingram: That is interesting. Thank you.

Mary Fee (West Scotland) (Lab): You have touched on sustainable procurement. Why was the sustainable procurement duty included in the bill? Will you explain a bit more about the changes that the provision will make to the current process?

Alastair Merrill: The sustainable procurement duty was introduced to send a signal to public sector purchasers that they need to think about what they want to achieve from the money that they are spending. It aims to maximise the contribution that procurement can make to economic recovery by, at the very beginning of the process, looking at how money can be used not just to buy goods at the cheapest price but to deliver the broadest benefits to the Scottish economy.

All too often, procurement is characterised as a race to the bottom in price. In the past, that has too often been the case. However, one of the main themes of the procurement reform programme since 2006 has been how procurement can deliver value beyond cash savings. Scotland is increasingly regarded as being at the leading edge of developing that approach, and the sustainable procurement duty is intended to encourage public sector purchasers to take that view.

Mary Fee: How will the sustainable procurement duty work in practice?

Alastair Merrill: In practice, it will apply to contracts above the threshold. It will require purchasers to consider the local, social, environmental and economic aspects of what they are buying and to look at the possibility of building those aspects into their specifications. If they do not consider that it is appropriate to include that information in the invitation to tender, the duty will require them to make a statement of why it is not included.

Instead of regarding sustainability as a kind of add-on at the end of the procurement process, we are turning that on its head and saying, right at the start, “When you are considering your approach to the market, think about the broader benefits that that can deliver.”

Mary Fee: So sustainability will be almost at the core of the process.

Alastair Merrill: Yes.

Mary Fee: How will contracting authorities ensure that actions that are taken under the sustainable procurement duty do not conflict with the general duties in section 8?

Alastair Merrill: That depends on how a purchaser structures their invitation to tender. We have been using community benefit clauses since 2008, especially to deliver training and employment opportunities. There is extensive guidance and case studies on how such clauses

can be built in successfully in a way that is entirely consistent with the section 8 duties.

Mary Fee: During the consultation process, what views were expressed on the sustainable procurement duty?

Alastair Merrill: The views fell broadly into two camps. There was concern that the sustainable procurement duty should not subvert the need for competition and value for money and that it should not introduce a huge amount of additional process. The other camp wanted to encourage broader consideration of sustainability and to maximise the social, economic and environmental benefits beyond the traditional cost quality ratio.

Mary Fee: Can you explain a bit more about what the benefits will be of contracting authorities being obliged to produce a procurement strategy and an annual report?

Alastair Merrill: The benefits are transparency and consistency. Most authorities already produce a procurement strategy of one form or another, but those vary greatly in structure, content and quality. Having a more standardised approach to a procurement strategy will send a clear signal to the market about what public bodies are planning to buy and how they are discharging the sustainable procurement duty.

The annual report is about transparency of performance, what contracts have been let and what opportunities there might be not only for purchasers to target potential future markets, but for different public bodies to work together and collaborate on future procurement opportunities.

Mary Fee: How and by whom will the strategies and reports be scrutinised?

Alastair Merrill: They will be produced by the individual public bodies and will be public documents. I expect them to be scrutinised by both the public and the relevant governance structures of the public bodies that produce the strategies.

Mary Fee: I note, from the guidance paper, that if organisations go above the threshold at a particular stage in the year they will be required to produce a strategy. What support will be provided to ensure that those strategies are competent and properly produced? Will there be any penalties if bodies do not produce a strategy?

Alastair Merrill: In terms of the support and guidance that are available, we already have a tool called the procurement capability assessment that is carried out by the existing procurement centres of expertise across all relevant public bodies. The assessment looks at their purchasing potential, their capability and how well they are planning and delivering. It provides support for bodies to develop procurement improvement

plans, and that support will continue and be developed further in the strategies and reports. I invite Paul McNulty to comment on the penalties.

Paul McNulty: We have not provided specific penalties in the bill for failing to produce a strategy but, as Alastair Merrill said, we would expect the governance structures that we have put in place in the procurement reform landscape, including in the Procurement Reform (Scotland) Bill, to have an impact. Each sector has its own governance structures in procurement, and we would expect them to keep a watchful eye on what was happening in terms of the production of a strategy.

Mary Fee: What was the stakeholder reaction to the provisions on strategies and annual reports?

Alastair Merrill: Sorry—I did not catch your question. [*Interruption.*]

The Convener: I am sorry, but we must halt proceedings. I suspend the meeting for a few minutes until we find out what is wrong with the sound system.

10:24

Meeting suspended.

10:30

On resuming—

The Convener: I reopen the meeting and I hope that things will go without a hitch. Mary, please continue your line of questioning.

Mary Fee: My final question is: what was the stakeholder reaction to the bill's provisions on strategies and annual reports?

Alastair Merrill: The majority of stakeholders supported them, although a significant number either disagreed or ticked, "Don't know" and did not respond. About half of the local authorities disagreed with the publication of strategic procurement plans, but about half agreed with that.

Mary Fee: Is further work being done with the half that did not agree? Were there specific reasons for their disagreement that could be responded to by making small changes, in order to bring them on board?

Alastair Merrill: That will be reflected in the guidance on the construction of strategic plans and there will be further discussion between the relevant centre of expertise and individual local authorities.

Mark Griffin (Central Scotland) (Lab): I will return to the issue of procurement strategies and annual reports. The Project Management Institute submitted evidence to the committee outlining the

benefits of proper project and programme management and pointing out that successful procurements are sometimes affected by poor execution. Is there potential to include in the bill a project and programme management job classification and the skills that would be expected for a particular post for the procurement strategies?

Alastair Merrill: The existing procurement capability analysis looks at the professional skills of individuals involved in procurement in individual bodies. I am a big fan of good PPM for exactly the reasons that you outlined. In the central Government sector, the gateway review process is used as a means of assurance and ensuring that particularly large-scale capital and infrastructure projects are properly managed in line with good PPM disciplines. I have reservations about it being appropriate to include a specific reference around skills development in the bill. It would be more appropriate to have skills development as part of the on-going capability development work rather than to introduce a specific legislative requirement for it.

The Convener: That is a very interesting point. The question of where to go to learn good procurement practice has been brought to my attention. I think that the University of Birmingham offers a postgraduate course. How do people learn about good procurement practice?

Alastair Merrill: The Chartered Institute of Purchasing and Supply is the senior professional body for procurement professionals and it runs a formal membership and accreditation scheme that is taught at a range of centres throughout the United Kingdom, including—Paul McNulty can correct me if I am wrong—at the City of Glasgow College, as well as through distance learning. One of the key performance indicators that the procurement capability assessment looks at is the number of professionally qualified people through the Chartered Institute that individual purchasing bodies have.

There is a range of qualification levels. The standard qualification is membership, which is, broadly speaking, the equivalent of being a chartered accountant or financier, and there are levels below that on the road to membership. We take professional development very seriously.

The Convener: Should we encourage bodies to put that in their annual reports?

Alastair Merrill: Yes, very much so.

The Convener: We move to part 3 of the bill, which is on specific duties.

Alex Johnstone (North East Scotland) (Con): What are the implications for public bodies of the

requirement to publish all contracts on the public contracts Scotland portal?

Alastair Merrill: It will create greater transparency and consistency of process and, therefore, a simpler and more streamlined process, and it will deliver greater value. The public contracts Scotland portal already exists and, since 2008, the procurement reform board has encouraged all public bodies to publish on it all contracts above £50,000.

Alex Johnstone: How will each aspect of the community benefit requirement work in practice? Given that, as you said, guidance has been in place since 2008, will the inclusion of those provisions in the bill change much?

Alastair Merrill: As I said in my opening remarks, much of that is about sending a clear message about the standards that we expect public bodies to follow. There are examples of excellence already out there, in which public bodies are taking very intelligent and innovative approaches to building in community benefits right at the start of the procurement process. However, the landscape is not consistent, and we continue to get feedback from third sector organisations and suppliers that suggests that there is inconsistency.

The aim is to encourage all public bodies to look at the example that is set by the best and to raise their game in that respect.

Alex Johnstone: We spoke earlier about thresholds. How was the community benefit threshold of £4 million arrived at?

Alastair Merrill: I will turn to Paul McNulty for that one.

Paul McNulty: We had some experience of what works and what scale of project the community benefit clause is typically appropriate for. There is nothing to say that a lower value cannot be considered, but we wanted to pitch it at a level that would not impose unnecessary burdens on the public sector. We thought that a threshold that was about the same as the European works threshold would be the right level.

The European thresholds go down to pounds, shillings and pence, because they are converted from rounded euro numbers into sterling. We used the European works threshold rounded to the nearest million.

Alex Johnstone: What issues will be included in the regulations and guidance under the provisions on the exclusion of bidders?

Paul McNulty: We specifically wanted to include the provision to help us to tackle standards of behaviour by suppliers. The 2012 European regulations and directives included a range of

grounds on which a purchaser can exclude a bidder. Some of those grounds relate to criminal offences or to other types of offence, but there is also a provision that states that, if a company has committed an act of grave professional misconduct in the course of its business, it can be excluded from competition.

We see that provision as a means of tackling a range of behaviours, not least the hot topic of blacklisting in the construction sector. We intend to define through the regulations the grounds on which public purchasers can exclude companies that do not meet the standards of business ethics and behaviour that the public has a right to expect of them.

Alex Johnstone: My final question relates to something that Paul McNulty just mentioned. The policy memorandum states that, as a result of recent events, issues such as

“the practice of blacklisting and the inappropriate use of zero hours contracts”

will be considered. How will the bill and the associated guidance address those specific issues?

Paul McNulty: We have been giving a lot of thought to how we can tackle those issues through the procurement process. Having consulted the European Commission, we are clear that it is not open to us to impose additional employment requirements that go beyond the national legislative framework. For example, having consulted the Commission, we are clear that we cannot specifically tackle the living wage in the bill. However, we can produce guidelines on how public bodies select bidders, and we expect those guidelines to cover how a purchaser addresses workforce matters.

For example, with service contracts for which the way that an employer treats its workforce has a direct relevance to the quality of service, we think that purchasers can and should take account of workforce matters. Purchasers can home in on individual factors, because a company that uses zero-hours contracts in a way that is not inappropriate might still be a good employer, so they have to look at the issue in the round. However, we intend to use the guidance to ensure that, where appropriate, and particularly for service contracts, where wage rates are often very low, purchasers take account of those factors when deciding who to select to bid and who to award contracts to.

Gil Paterson (Clydebank and Milngavie) (SNP): I understand the extent of control with regard to the original contract, but can that be implemented when it comes to subcontracting, which is common in the construction industry?

Paul McNulty: Obviously, the situation gets a lot more complex as we work down the supply chain, particularly in construction, where supply chains can be complex and long. We will give some thought to that, but subcontracting is a lot more challenging because, when the purchaser takes a decision, he will not necessarily have a guarantee that he knows all the subcontractors in any particular supply chain.

The Convener: Does section 29, on withholding information, need to be there, given that the issue is covered by the Freedom of Information (Scotland) Act 2002? Alternatively, should the wording be changed to align more closely with that act? That is just something that you might want to look at.

Paul McNulty: We can give it some thought.

The Convener: We will move on to part 4, on remedies. What is the reason for introducing a remedies regime purely for contracts that are between the bill thresholds and the EU thresholds?

Paul McNulty: As Mark Richards described when he explained the interaction between the European legislation and the bill, we already have a remedies regime for above-threshold contracts. We want to introduce a remedies regime in the bill so that there is an incentive to comply and some rights of redress for businesses that feel that they have been disadvantaged in the procurement process through a failure to comply with the bill. However, we need to ensure that we do not create unnecessary risks and burdens so we have taken the existing remedies regime from the 2012 regulations and adapted it to make it a lighter-touch regime for the lower-value contracts that will be affected by the bill.

For example, in a procurement under European legislation, bidders have to be given a 10-day standstill period to allow them to raise a challenge if they are unhappy with the decision, but we have not replicated that in the bill. Likewise, if there are significant serious offences under the European legislation, even if the contract has been signed, the court has the power to rule that that contract should be regarded as ineffective. We have not transposed that provision into the bill either. The intent was to create a regime that would give businesses some rights of redress if they feel that they are being disadvantaged but with a substantially lighter touch than that of the European regime.

10:45

The Convener: To many who might want to bring proceedings under section 32, the 30-day period would be too short. People might be more likely to put in a challenge anyway because they

have only 30 days. Is it possible to extend that period to 60 days, or would that breach EU legislation? The problem is that people might put in a challenge and then find out when they have done all the legal stuff that a challenge is not really necessary, whereas if they were given longer at the start there might be fewer challenges.

Paul McNulty: The 30 days pretty much replicates what is in the European legislation. You are right that, from time to time, we see challenges coming in because companies are frightened that the time period will expire, but that is the period that is in the European legislation. We could plump for a different period if it was felt to be appropriate but we thought that the simplest approach would be to replicate what is in the existing European framework.

The Convener: What were the views of contracting authorities and contractors in the consultation?

Paul McNulty: It would be fair to say that they were mixed. There was majority support for remedies, but some respondents wanted us to go further. For a lot of provisions in the bill, there are many different interest groups at play, so a lot of business representatives probably thought that we were not going to go far enough. For example, some asked us to consider whether we should create a procurement ombudsman in Scotland. Many public sector and professional body respondents were less enthusiastic about a remedies regime that would create a new risk of challenge on procurement issues.

Jim Eadie (Edinburgh Southern) (SNP): I have a question about the procurement of recyclable and reusable materials, and then, if I may, convener, I would like to ask about small business.

Part 3 of the bill contains an amendment to the Climate Change (Scotland) Act 2009 to give ministers the power to make regulations to ensure that a certain proportion of goods that are procured by contracting authorities are repaired, reused, refurbished, remanufactured or recycled. What is the rationale for that change and will it drive sustainability and economic growth? When does the Government intend to lay those regulations?

Alastair Merrill: I turn to Stuart Greig for advice on that.

Stuart Greig (Scottish Government): It is fair to say that the markets for what are called green products are still pretty underdeveloped. At the same time, we are facing what are affectionately known as megatrends—that is the most recent term that I have seen—such as the climate change trend, the water scarcity trend and resource scarcity. All those trends will create

pinchpoints that will affect the price of commodities.

Business has been looking at some responses to those trends. One is to be more efficient in manufacturing and production, and the next shift is to think about changing how we manufacture things and whether we can move towards remanufacturing, create products that are easy to disassemble, or sell a different proposition to the public, such as a service rather than a commodity. We are working closely with companies in the UK and internationally to look at the direction that they want to take. The signal that we have had is that, to get to that point of innovation in product design and manufacturing, there needs to be a strong signal in the marketplace that gives those corporations investor confidence and the confidence to take the necessary leap with innovation. That is the rationale behind the change—we are trying to stimulate a set of market conditions that will re-energise innovation around the concept of remanufacturing, product disassembly and designing for durability.

Jim Eadie: It is helpful to know that that is the rationale. You have identified that there is a business opportunity and a market for those types of product. Have you identified the companies in Scotland that can deliver?

Stuart Greig: There are already a number of companies in Scotland in that space. We need to help the expansion of those sectors and help to stimulate new sectors to emerge. The excellent foresight report on the future of manufacturing across the UK, which came out just last week, talks a lot about issues such as the need for an emergence of real hubs around remanufacturing and the need for much more integration between manufacturers and retailers in relation to how products move to market. That will be the trajectory.

We have some great examples in Scotland already, such as HP in Bishopton, which I think has the largest computer refurbishment facility in Europe, and I understand that it is looking at the next direction for that plant. We also have Mackie Motors, which does gearboxes and which is all about refurbished products. So there are a number of such companies already in Scotland, but we want to stimulate more of that kind of innovation.

Jim Eadie: You want to stimulate more of that type of innovation, but what specifically will the bill do to stimulate growth in the sector?

Stuart Greig: We are doing a market analysis. We are talking to the companies and gathering evidence to show the sort of things that the public sector buys at the moment and the companies that are in the marketplace providing that, whether in Scotland or internationally. The question is

whether we can move towards a different practice. For example, the public sector purchases lots of uniforms, which are manufactured from scratch. Given that there is a great textiles industry in Scotland, will there be an opportunity in future to move towards stimulating the remanufacture of uniforms from old materials and recycled content? How long would it take for companies to innovate to be able to do that? That is the kind of market analysis that we are beginning to do.

It would be the same with information technology equipment. Refurbished IT equipment is already available. Could we set in place a timeline that would allow the first level of innovation, which is refurbished products, then the next one of design for better reuse of some products? We are gathering intelligence on all that to help us shape what a set of regulations would look like.

Jim Eadie: So the answer is that we do not know yet what the impact of the bill will be or what it could specifically do to stimulate growth.

Stuart Greig: The bill will provide the enabling power for us to consider what the regulations would look like and where the key market opportunities are. Once we have that information, we can have a full business and regulatory impact assessment and understand where the key market opportunities are. The bill gives us a road map to start to move into the area.

Jim Eadie: I move on to small businesses. On page 3 of the policy memorandum, paragraph 11 states:

"it is clear from the Scottish Government's engagement with key stakeholders that there is still room for substantial improvement."

It has been suggested that small businesses and local firms in a range of sectors face barriers to participation in the public procurement process and in accessing contracts and bidding successfully for them. How does the bill intend to address that point so that small businesses and local firms are not disadvantaged and held back?

Alastair Merrill: Throughout the bill, the aim is to standardise and streamline processes so that businesses, whether they are selling to a local authority, a health board or central Government, experience the same procurement process and do not have to adapt their approaches to the separate procurement processes of every single public body. For example, on the requirement to advertise contracts on a single national portal, the public contracts Scotland portal is free to use and businesses can register on it and receive email alerts on contracts that are of interest to them. Because the portal is linked to our PCS tender tool, once businesses enter information on such

contracts, that can automatically be translated into prequalification.

The experience of public contracts Scotland is that small businesses have a high success rate through using the portal. Something like 80 per cent of the contracts that were advertised on public contracts Scotland in 2012 went to small and medium-sized enterprises. There is a big gap in our knowledge, because not all contracts go through public contracts Scotland, as I think was highlighted in the report on the issue by Jim and Margaret Cuthbert. However, introducing that requirement will help us to track the benefits to small businesses.

The situation with prequalification is similar. Over the past years, we have worked in partnership with the business community through the supplier engagement working group, which is chaired by Liz Cameron of the Scottish Chambers of Commerce. The working group's remit is not only to identify the barriers that businesses face in accessing public contracts but to come up with practical, legal and affordable ways of overcoming those barriers.

Prequalification is one of the biggest barriers that businesses face. Through the supplier engagement working group, a standard and proportionate approach to prequalification was developed that gives a standard core set of questions that can be adapted to particular circumstances and complexities. The approach, which is built into our electronic public contracts tender system and which has been endorsed by the procurement reform board, has been rolled out and is in use. However, because it is being used only patchily, the feedback from businesses is that they still face the burden of prequalification. That burden falls disproportionately on smaller businesses, so standardising the prequalification process and making that a requirement would be a significant boost to their potential to win public contracts.

Jim Eadie: Are you devising a series of metrics that would allow you to measure over time whether you are achieving the substantial improvement that the policy memorandum states requires to be made?

Alastair Merrill: We have a metric that covers the use of PCS tender, which is the electronic tendering system that is built into the portal. That is the only means that we have at the moment of measuring how standard prequalification is being used. One would expect the tenders that win contracts to be at the leading edge of standardising prequalification. However, according to the latest run of figures that the technical guys did yesterday, only 43 per cent of contracts that are let through the PCS tender system used the standard prequalification process. That figure

gives a baseline and I expect that metric to be measured over time. I would expect the numbers to increase significantly once the bill is passed. We will then be able to track how that translates into the proportion of business that is won by small businesses.

We already measure the spend that goes to SMEs and, because the information comes from organisations' accounts payable, it is comprehensive. A fairly constant 45 or 46 per cent spend on procurement goes directly to SMEs. The percentage is substantially more if the supply chain is built in, but we do not yet have the means to measure that.

Jim Eadie: Small to medium-sized enterprises are organisations that have anything from one to 200 employees.

Alastair Merrill: Yes.

Jim Eadie: How do we know that the spend going to them is increasing?

Alastair Merrill: I do not have the percentage figures with me, but we can break down the spend figures. Roughly half of spend is to organisations that employ fewer than 50 employees and roughly half to organisations that employ between 50 and 250 staff.

Jim Eadie: We have a baseline that will help us to measure whether we are making progress.

Alastair Merrill: Yes.

Jim Eadie: That is helpful.

The Convener: Is there an incentive for contracting authorities to use the portal? Paragraph 78 on page 16 of the policy memorandum states:

"For example, one contracting authority with a procurement spend of approximately £300m conducted over 2,400 contract opportunities within PCS, whereas another contracting authority which had a spend of approximately £323m only placed 104 contract notices during the same period."

I do not know whether you are willing to name and shame authorities, but how do we encourage everybody to use the portal?

Alastair Merrill: We have been encouraging organisations to use the portal since 2008 and there has been significant growth in its use. There are several incentives for public bodies to use the portal. It is free and therefore saves them money, because they do not have to advertise contracts electronically or through paper adverts. It links in to standard processes that have been centrally developed in consultation with all the sectors, with the aim of being the best and simplest in class, which means that they do not have to reinvent processes. It also means that a public body can use its procurement expertise to focus on the

things that really matter to it, rather than having to do all the drudge work of the basic procurement processes. When public bodies use public contracts Scotland and the tools that are embedded in it, that is already done for them, so there ought to be considerable incentives for them to use it.

11:00

The Convener: If the portal is used, will that not also provide more openness and transparency in the system?

Alastair Merrill: Yes, very much so. It will create greater transparency and, from the point of view of public reporting, it will mean that a body's contracts register can be drawn directly from public contracts Scotland. In other words, the publishing of a contracts register, which is a requirement, will be done automatically.

The Convener: Mary Fee wants to ask about the living wage.

Mary Fee: The issue of the living wage was included as part of the consultation. Many of the respondents to the consultation agreed that including a requirement to pay the living wage in the procurement process would be a good way of ensuring that the living wage was paid. At the start of the consultation process, was there an awareness that including the living wage in the bill would not be compatible with EU directives? If you were aware of that, why was the issue included as part of the consultation?

Alastair Merrill: Yes, there was an awareness of that. In 2012, Commissioner Barnier sent a letter that confirmed that a living wage that was set at a higher level than the UK's minimum wage would be unlikely to meet the requirements of EU legislation. The annex on the living wage was included in the consultation because of the strong interest in living wage issues in Scotland and because of the Government's policy of actively promoting the living wage and encouraging employers to pay it. We felt that it was appropriate to seek views from respondents that would help to inform our consideration of how such issues could be tackled in a legal way through the bill, to which Paul McNulty referred. That led to the development of the proposals on workforce issues.

Mary Fee: Did that lead to the provisions in the bill about guidance? Was that the reasoning for including the living wage in the consultation?

Alastair Merrill: That certainly informed the thinking about guidance.

Mary Fee: What are the Government's proposals? Is it encouraging contractors to pay the

living wage? Including guidance on an issue does not mean that a contractor will comply.

Alastair Merrill: The issue goes beyond procurement. It is about sending out a message on standards. The guidance will allow workforce issues to be taken into account in the formal procurement process as part of the terms of letting a contract but, beyond that, the Government has a much broader approach to encouraging contractors to pay the living wage. All Scottish Government employees are paid at least the living wage, and the Government has made numerous statements on the living wage and its commitment to promoting it.

Mary Fee: So will contractors be actively encouraged to pay the living wage and will they be disadvantaged—that is perhaps the wrong word—in the procurement process by not getting contracts if they do not commit to paying the living wage?

Alastair Merrill: We encourage contractors, as we encourage all businesses in Scotland, to pay the living wage, because we see that as sending a strong message on the importance of workforce issues. I invite Paul McNulty to address the technical aspects of how that would work in the context of the bill.

Paul McNulty: In effect, the guidance that we envisage will advise purchasers that a company's approach to recruiting, engaging with and motivating its workforce is relevant to the quality of service that the company is likely to provide—obviously, it is more likely to be relevant in the case of service contracts—and that the issue should be taken into consideration at the selection stage and at the contract award stage of a procurement process. There would be a real incentive for a company to demonstrate that it has a very good and enlightened approach to managing its workforce.

Gil Paterson: We are discussing procurement, but a different piece of legislation would be needed to address wages and salaries. We would need another act of Parliament to effectively bring in a living wage, and this Parliament has no powers to do that. Is that correct?

We cannot effectively control those things through procurement. We can say nice words and give an indication of how people in business should behave, but we do not have the powers to bring in a living wage in the bill, do we?

Alastair Merrill: Yes—that is my understanding. Commissioner Barnier's letter was very clear on that. He stated that

“A 'living wage' set at a higher level than the UK's minimum wage”—

in other words, the minimum wage that is set out in statute—

“is unlikely to meet”

the requirements under European law.

Gil Paterson: So only member states can set or adjust wages. In other words, if the United Kingdom set a wage at a higher rate than Germany, there would be no problems associated with that.

Alastair Merrill: That is right.

Gil Paterson: But that cannot be done within a member state.

Alastair Merrill: Yes.

Mark Richards: The issue is the reserved/devolved divide and what we can and cannot do on employment law. The minimum wage is set as part of employment law, so it is a question of what can and cannot be done in that regard. There must be a national system.

Gil Paterson: Okay—thank you.

The Convener: Jim Eadie has a question on the equality impact assessment.

Jim Eadie: The equality impact assessment notes that any guidance on the provisions of the bill should refer to the relevant Equality and Human Rights Commission guidance. Why is that necessary?

Alastair Merrill: Procurement policy and legislation is fundamentally non-discriminatory and requires all public bodies to treat bidders equally and without discrimination. The bill will allow public bodies to restrict participation to bidders who meet the definition of a supported business. This opportunity allows us to refresh guidance and draw to purchasers' attention opportunities such as the use of supported businesses.

Paul McNulty: It is necessary partly because a range of duties that are relevant to purchasers already exist in the current equalities legislation. We have been working with the Equality and Human Rights Commission in Scotland to produce guidance for purchasers in that regard. If it would help the committee, I would be happy to send you a copy.

Jim Eadie: That is helpful, as are Mr Merrill's remarks on supported businesses.

Page 26 of the policy memorandum contains a list of areas in which discrimination is prohibited, but it does not specifically mention disability. Why? Additionally, why is there no mention of sexual orientation?

The memorandum states that the bill includes provisions

"In relation to the prohibition of discrimination, where a person is entitled not to be treated differently because of their sex, race, colour, language, religion, politics, opinions, nationality, social status, association with minorities, property, birth or other status".

The reference to "other status" could encompass disability and sexual orientation, but I wonder why the list does not mention those things specifically.

Alastair Merrill: We will investigate that and address it, if we may, in our follow-up correspondence.

Jim Eadie: Thank you.

Gil Paterson: What are the Government's plans for transposition of the new EU directives?

Alastair Merrill: Paul McNulty is the world expert on EU matters.

Paul McNulty: We are going to have Scottish implementation regulations. As I mentioned earlier, the new directive has not yet been adopted by the European Parliament, but we believe that it may be adopted in January 2014. We understand that it cannot be adopted before then because of some difficulties that have been experienced with translation work.

At that point, we will begin a consultation process. There are a significant number of policy options for member states, among which I include Scotland, because we have our own implementing regulations—we are the only devolved Administration that currently does. The consultation process, which will begin in 2014, will enable us to understand how we should exercise those policy options in Scotland.

Gil Paterson: Can the Government describe the bill's relationship to the new EU directives?

Paul McNulty: Obviously, what we put in place on procurement will have to dovetail with the European directives. We touched on that earlier, and it is a key reason why we are seeking enabling powers. We know from experience that the new directives will not be static even once they are implemented by member states, because of decisions by the courts and the expected publication of guidance by the European Commission on various aspects of the new legislation in Europe over 2014-15.

The understanding of what the new directives mean and how they will be interpreted will evolve over time. One reason why we are seeking powers with regard to regulations and guidance in the bill is because the detailed provisions for what we do in procurement in Scotland will need to be adaptable over time, so that we can ensure that they continue to be compatible with the European framework.

The Convener: As there are no more questions, I thank the witnesses and suspend the meeting temporarily to allow them to leave the room.

11:11

Meeting suspended.

11:18

On resuming—

The Convener: We will now hear evidence from a panel of expert witnesses on the Procurement Reform (Scotland) Bill. I welcome Dr Jim Cuthbert and Margaret Cuthbert; Duncan Osler, partner at MacRoberts LLP; and Christa Reekie, commercial director, and Barry White, chief executive, from the Scottish Futures Trust.

Alex Johnstone: I will start with general questions and let the witnesses say what they like in response. The policy memorandum states that the bill aims to establish

"a national legislative framework for public procurement that supports Scotland's economic growth by delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems".

What are your views on how the bill achieves those objectives?

Jim Cuthbert: The bill's intentions are good, but the sustainable procurement duty in particular is defined in such nebulous terms that it is unlikely to achieve much in itself. To make significant progress, there are two requirements, which might not fall strictly within the bill's scope but which are important. One requirement is for a fundamental change in attitude on the part of those who organise procurement; the other is for some change in structures and probably the provision of extra resources.

I will explain briefly what I mean. On attitude, a bit of negative evidence was the reaction in "Public Procurement Reform—a rapid evidence review", which Dr Vivian Leacock produced, to the points that we made in our Jimmy Reid Foundation report. We sent a note round the committee that said that the way in which the serious and evidence-based points that we made were dismissed on inaccurate and misguided grounds indicated that attitudes had not really changed in the procurement and commercial directorate.

On structures and resources, the bill encourages the use of procurement spend to drive forward innovation. That is praiseworthy, but it is now fairly well known—this was confirmed by work that we did for Scottish Enterprise—that there are a number of requirements for doing that, one of which is that resources need to be put in place.

Extra resources need to be put in to help client bodies to identify the areas in which innovation could be driven forward.

Structure is important, because it is important that the client body gets close to the firm that is—we hope—coming up with an innovative solution to a public requirement. In those circumstances, central purchasing bodies can play a blocking role in the middle. I am not saying that central purchasing bodies should be done away with, but one needs to think about such structural points before one succeeds in driving forward innovation.

The bill's provisions are fairly general. I was surprised by the limited extent to which the bill does specific things that could be done. For example, the identified major barrier to engaging with small to medium-sized enterprises in public procurement is the size of the contract. The bill could have laid down a legal requirement to split down contracts, as is done in a number of other European countries, but that has not been done.

The bill is ambiguous about the duties that are to be laid on central purchasing bodies. They are not included in the schedule to the bill in the list of bodies that the bill covers. I am not clear about whether they will have a duty to produce an annual procurement strategy, but there would clearly be a big advantage if a duty was laid on them to do that and to consult their client bodies on the extent to which they could act as a bridge on the requirement for innovation between the client bodies and the supplying firms.

I have probably said enough. Those are my initial comments.

Margaret Cuthbert: If I, too, could answer the question, I would be pleased. Thank you for having us at the meeting—that is very good of you.

Public procurement in Scotland is worth over £9 billion, as we all know—in fact, the estimates vary to up to £11 billion. The main thing that I would like to say is that, if we are bringing in legislation, we have a golden opportunity to address the problem that Alex Johnstone mentioned of how we can use procurement to improve the economy, research and development, and innovation, and to address in part the gap that there has always been between Scotland's growth rates and those of some other European competitor states.

There has been a dreadfully missed opportunity. The bill is light and it does not address the number of different types of procurement in Scotland, such as the private finance initiative or its successor, the way in which the Scottish Futures Trust works and how the major corporation of Scottish Water and other bodies work. I almost thought that it tended to be just about local authority bodies, but

there are central Government bodies, local authorities and universities, for example.

Each of those bodies contributes in its own way to holding back growth in Scotland because, at least since 2006—if not earlier—the procurement policy has been to chase value. As Alastair Merrill admitted, it is recognised that there was a race to the bottom. We can see in some of the contracts that have gone through public contracts Scotland even in the past four years that, although there is a nod and a wink to the economy and training, for example, they are a small percentage of the value package, and most of it is about price.

How can we change things so that they address the major point that Alex Johnstone raised, which is that the bill is supposed to encourage the economy and research and development? It is extremely weak on that. It has so much fluidity and flexibility that it can mean almost all things to all men. I hope that we have the chance to discuss that.

The Convener: Is that not because the bill, by its nature, has to be fairly high level, whereas some of the detail that you want will be in regulations?

Margaret Cuthbert: On that you have the advantage, because I am not a politician or a lawyer and I am not quite sure how all these things feed together. However, if clearly stated regulations are to accompany the bill, I would be delighted if sharing some of our research could inform and help with them.

I believe that the bill is weak as it stands. I am concerned that many of the points in it give the impression that we must have a level playing field. Procurement actions in Scotland for at least the past 13 years have favoured large business on matters such as PFI, which has had effects throughout construction, for example. We do not have the distribution of construction businesses that we used to have, although PFI is not the only reason for that.

That means that we have to do things to encourage innovative firms and SMEs. We do not want a level playing field; we have to right the wrongs of the past 13 years. I would like to discuss that in relation to the bill, if that is at all possible.

The Convener: This is a chance for Barry White to come in.

Barry White (Scottish Futures Trust): Thank you very much. As Margaret Cuthbert said, it is a pleasure to be here, so thank you for the opportunity.

We welcome the bill and we think that, where good practice exists, the bill will not have a huge effect—some people already do a lot of the things

that are intended by the bill. I do not quite have the negative view that perhaps Margaret and Jim Cuthbert have of public sector procurement in construction. In fact, I have a very positive view of a lot of the good practice that exists.

As has been highlighted, the bill will depend a lot on the regulations and guidelines that are published. We see a number of practical issues with how the guidelines might work. If we are to exclude people on the basis of convictions or performance, for example, the grounds for that will need to be clearly stated; otherwise, that could lead to challenges and so on.

The community benefits side of the bill is strong. Again, good practice already exists, as community benefits clauses are being widely used. I will give some examples from the City of Glasgow College project, which is part of the non-profit-distributing programme. That project involves a minimum of 40 new apprenticeships, 170 new entrant placements and 500 hours of capacity building to help SMEs to prepare to be part of the project's supply chain. We will not just give SMEs opportunities; we will actively work with them to ensure that they are ready to take advantage of the opportunities.

Comments were made about favouring larger firms. We do not do a lot of direct procurement; we work with procuring bodies such as local authorities and health boards. We see a huge desire and willingness to bring in smaller firms and, through things such as the hub programme, large opportunities are flowing through to SMEs already.

Margaret Cuthbert mentioned splitting projects up. Projects in the NPD programme need to be a certain size to be financeable. Banks simply will not finance very small projects, so we have to bundle projects together. Part of our flexibility is that we can award the contracts within a bundle to different contractors, so it is not the case that all contracts must automatically go to one contractor.

It might emerge that the bill brings a set of regulations into an area in which local regulations currently apply. The effect might be that local procuring bodies consider that frameworks will help them to manage the bill's aspirations more effectively. That could help with establishing a framework with a set of performance indicators on SME involvement, jobs and training, and that could be seen as a way forward for some procuring bodies.

Overall, we are very supportive of the bill, which reinforces existing good practice. I do not share Jim and Margaret Cuthbert's negative views of the bill. They know that I do not share their views, so that will not come as a big surprise to them.

11:30

Alex Johnstone: Are there any other comments?

Duncan Osler (MacRoberts LLP): Thank you for the opportunity to speak to the committee.

To answer Alex Johnstone's initial question, the bill in itself cannot achieve the aims that were mentioned. It needs to be seen in the context of the procurement regime from Europe. The European regime is all about economic competition, which tends towards economies of scale and tends to be articulated in the language of money and economics.

The fact that the bill introduces an annual procurement strategy that requires authorities to think about more than the economic side of things may come to be seen as significant. Although legislation thinks—rightly—about the pound in the public purse, accountability and protection of assets, the purpose of public service activity tends to relate to social aims, social support, economic matters and sustainability.

If an annual procurement strategy explains that the procurement decisions that will be made will inform the overall set of social outcomes, that will be helpful. In the absence of that, we might wonder how an authority could know how well it had performed. The reporting is important.

There are a number of other points to make. A legal point relates to the remedies regime.

The Convener: I think that we will come on to that later.

Duncan Osler: Apologies.

The Convener: We will leave that issue for a moment.

Alex Johnstone: The policy memorandum highlights the need for processes and systems that are

"transparent, streamlined, standardised, proportionate, fair and business friendly."

On those criteria, is the bill a hit or a miss?

Jim Cuthbert: I will amplify a point that I made earlier. There is a question about the extent to which the bill will disrupt the current de facto procurement strategy. To my mind—others disagree—that strategy is characterised by two things. The first is the desire—still—to meet the conditions for getting projects off the books. When the Scottish Futures Trust was set up, it was specifically laid down that projects should be off the books. As soon as that road is gone down, we are talking about large projects that bundle capital and service together, about the long term and about financeability constraints. That element of

the strategy pushes bodies down the road of large contracts.

Secondly, one suspects that an element of the de facto procurement strategy is designed to help small and medium-sized enterprises, but by getting round the European directives—by letting initially large contracts and then subcontracting outside the scope of the European directives. We pointed out to the committee previously that one of the invitations to tender on the portal said that it was for a subcontract for the Forth road bridge but, in terms of the EU directive, it was a business-to-business subcontract, so it was outside the EU directive's scope.

De facto, SMEs are being helped by the pushing through of the large-contract-then-subcontract-agenda. That may or may not be the way in which the committee wants to go. There is a lot to be said against pushing the bulk of businesses into a subsidiary subcontract position. However, it is for the committee to decide whether it wants to go down that road.

If that is the de facto agenda that is driving procurement in a certain direction, will the bill disrupt that? My inclination is to feel that the bill will not significantly disrupt it, so there will not be much change.

Christa Reekie (Scottish Futures Trust): It is extremely important that the bill refers to regulations and guidance. The public contracting authorities will look to the Government to provide that, because it is important. Making things more accessible means standardisation in the form of sample clauses and standard qualification questionnaires—we cannot say “prequalification questionnaires”, because that is EU terminology—so that people become familiar with them and find them easy to use.

The trick is to make the regulations easy to use and to provide standardisation and sample clauses. That will take away the scariness of a new piece of legislation and will help people to do things more quickly and efficiently.

Duncan Osler: I have two points on what Jim Cuthbert said. First, in relation to subcontractors, there is a policy question about whether we wish to require authorities to think about breaking requirements into lots. That might be dealt with in the bill or in regulations.

Secondly, the committee needs to be aware that the European directive that is coming—it has not yet been published to the private sector—will contain new provisions that tend to require bidders to reveal their subcontractor approach prior to the award of a contract, as part of the bidding and evaluation process. That has some bearing on what is being said, because authorities will tend to know what might be coming down the line in the

subcontract package. I cannot say more, because I have not read the directive yet.

The Convener: Just before Margaret Cuthbert replies, Barry White mentioned that contracts have to be of a certain size in order to get finance. Is it not the case that companies in other countries are better at collaborating to form consortia—or have been up to now? Here in Scotland and the rest of the UK, companies tend to think of themselves as competitors rather than seeing that they might, if they get together to form a consortium, do better at securing contracts.

Barry White: There are a number of points sitting behind that. There are big contracts in which the contractor's balance sheet becomes very important, which is just a practical reality for a company that is doing a project like the Forth crossing, for example. There are also projects that might combine with two or three other projects in order to get financing. Those bundles are much smaller than they were in the past. Some past PFI and public-private partnership projects—for example, schools projects—were worth about £100 million. The bundles that we are dealing with now are £20 million to £25 million. We bundled three health centres in Forres, Tain and Woodside in Aberdeen; putting those projects together meant that they could be financed.

The important point is that in such projects the work for the main contractor and the subcontractors' works packages—many of those packages flow to local SMEs—would simply not exist without the financing group. The carpenter, painter or floor-layer who has to finish off Aberdeen health village before it opens would not have that work were the NPD financing not in place. That financing is creating work and great buildings for public services that would not otherwise exist.

Large contractors will move across Europe to bid for the very big contracts; I have worked for European contractors, so I know that that is the reality. We encourage UK contractors to get together to bid for contracts, but we cannot dictate that in any way. It is great when it happens, but we cannot make it happen. Doing what we are doing with the contractor for the City of Glasgow College and helping SMEs to access works packages and to be better prepared to bid for them is really important. The creation of capability is really important.

Margaret Cuthbert: First, the questions that were asked in the first evidence session today covered quite a lot of the things that I wanted to say. They were very well-placed questions, to which the committee now has the answers. However, I will just add three little points, the first two of which are on transparency.

First, on transparency and information that contractors give and which is available on the strategy documents, it seems to me that the procedures that have been used to date—which, as Alastair Merrill pointed out would be in the strategies—are not worth the paper that they are written on.

The existing public contracts procedure is a very good process through which companies can say that they are available and local authorities and central Government can say what they want. The committee will know that there are a lot of framework programmes; the framework programme is the item that is recorded. So, if there is a framework for supply of books, for example, and five companies are chosen to supply the books for the next five years, we do not know which of the five companies will be used; it might be only one of them, but it will not be recorded on the database.

Secondly, some contracts go outside Scotland to framework programmes that are run in south-east England and which are used by our local authorities. However, we know nothing about those contracts because they are not on the database. In order for central Government in Scotland to know what is happening in public sector procurement in Scotland, by law there should be recorded every year, for each project, the following: a project number, the number of bids, the dates, who got the contracts, the site of the company's head office, the number of employees in Scotland, the size of the parent company, the number of apprentices on the job, the total value of the contract, the number of years it lasted, whether there was research and development, and what local conditions were applicable. Unless we ask those questions, we will not have a clue about whether the local authorities, Government departments and so on are conforming at all to what we want.

I had better leave it at that. Old age takes its toll.

Jim Cuthbert: Can I—

The Convener: Perhaps you can weave your point into another one later, because we need to move on. Mark Griffin is next with a question.

Mark Griffin: I will follow up with questions that we asked the previous panel. Does the bill cover the right set of contracting authorities? Are there other bodies or groups of bodies that should be included—bearing in mind the previous panel's response on utilities being covered by different European Union regulations? Should any of the bodies that have been included not be included?

Jim Cuthbert: I will start on that one. I am disappointed that Scottish Water is not covered. I appreciate the technical difficulties in covering utilities, but it would be very desirable if the

general duty of sustainable procurement was laid on Scottish Water and it had to produce an annual procurement strategy. It might be possible for the bill to lay that requirement on such bodies without getting caught up in inconsistencies and detailed regulations. The other class of body, which I have already mentioned, is central purchasing bodies. I am not clear whether a sustainable procurement duty and a duty to produce an annual strategy will be laid on those bodies, but I certainly recommend that it should be.

Margaret Cuthbert: I, too, am very disappointed that Scottish Water is not covered. The answer that was given earlier on that was that it would be difficult—which is understandable—and that it could be covered by another procurement directive. In fact, what was endemic to the answers that the committee was given in the earlier evidence session was that what has been done in the bill has been done in the interests of simplicity and ease. I can see why that would be done when choosing the threshold levels, but there are too many things for which greater consultation was required and which we should address—including Scottish Water. It will be no surprise to anyone around the table that although Scottish Water has only one shareholder—the Scottish Government—it is, in fact, very highly privatised. We are not getting the chances in Scotland of going for jobs, company research and development, and company growth that we could have.

11:45

Barry White: We think that the bill probably covers the main public bodies that do the bulk of procurement.

The Convener: I invite Mr Osler to offer a legal point of view.

Duncan Osler: I think that extending the scope of the bill to cover Scottish Water would be possible; I can only assume that the bill team considered that and decided for whatever reason that it is not, on a policy basis, to be preferred.

There is a point about simplicity. The test should be whether the bill can be enacted relatively simply and, if it can be, what the benefit of that would be in terms of sustainability, social impact and effectiveness. Simplicity is not just about what the public sector has to do—it is also necessary for the contracting side of things.

Mark Griffin: Is the panel broadly supportive of the introduction of the new regime for below European Union level procurement that is set out in the bill?

Duncan Osler: Yes.

Margaret Cuthbert: Yes.

Jim Cuthbert: Yes.

Barry White: Yes.

Christa Reekie: Yes.

Mark Griffin: That was straightforward.

What do you think that the impact of the introduction of new thresholds will be on contracting authorities and contractors?

Duncan Osler: A number of authorities are already looking to act in a similar way, and they are finding that useful and successful in achievement of their aims. It is a corporate matter for other bodies if they find it difficult to do, but the gains over the piece should be attainable across all public bodies if they can strategically identify their procurement aims.

Jim Cuthbert: I have nothing to add to that.

Christa Reekie: There is no doubt that the introduction of new thresholds will involve more work for public authorities, but as I have said, if we put in place standardisation and there are pro formas, that should take the sting out of it.

For the private sector, I think that the bill will lead to greater transparency and equality of treatment, particularly if there is standardisation. If companies can use the same kind of documents, that will definitely help. In addition, a number of remedies will be available; perhaps we can discuss them later.

The Convener: Mary Fee will move on to ask about part 2 of the bill, "General duties and procurement strategies".

Mary Fee: I want to touch on the sustainable procurement duty, which our previous witnesses commented on; the panel may have something to add. What impact will the introduction of the sustainable procurement duty have on procurement practice?

Margaret Cuthbert: As drafted, the bill will probably have very little effect on sustainable procurement. However, there are a number of ways in which sustainable procurement is being achieved in other countries in Europe and in which it could be achieved in Scotland. Jim pointed to one that is desirable, which is the breaking up of large projects into lots, which is done in many countries in Europe. In some, that is set down in law—in Germany, for example—which means that SMEs have the chance to be main contractors rather than subcontractors, which is incredibly important.

I have been visiting companies for most of my life. When the steelworks in Lanarkshire closed down, I had to go round a good number of companies. The big problem was that most of them had been subcontractors, which meant that

they did not have the management or marketing ability to become main contractors. Many of our SMEs are always just subcontractors; that is a big problem.

Also, there is nothing in the bill to encourage research and development; we should link the bill to other EU research and development directives—although the EU procurement directive does not cover research and development so well, so perhaps it should not apply to that. If we were to do that, we could encourage many more companies in Scotland to do R and D. For example, procurement in bioenergy and schools need not have gone through the European procurement directive. I had better leave it at that.

Jim Cuthbert: Part of sustainability should be about value for money. An important opportunity has been lost in not making specific provisions—either in the bill or through regulations—about openness.

To return to Barry White's point that we would not have certain projects without PFI or the Scottish Futures Trust, although that is true, that is not the argument for doing it in the way that we do. We need to know whether we are doing it well. That is difficult to determine under PFI and the Scottish Futures Trust, because it is only with great difficulty that one can get one's hands on the detailed financial projections that say how much profit has been made and whether there is the likelihood of excess profit.

It would be easy to provide in the bill, for bodies that commission large projects, a condition for letting the tender such that, after a decent interval—18 months or two years, when there are no longer strong issues of commerciality and confidence—the detailed financial projections from when the contract was signed must be made publicly available. That would do a vast amount in terms of allowing people to see what is happening.

We know a little bit about what is happening. For example, we know that the introduction of the Scottish Futures Trust has meant that the grotesque excess profits that were happening under PFI have stopped. That has been combed out. However, from the couple of Scottish Futures Trust financial projections that I have been able to get hold of and analyse, we see that other things are happening; for example, large initial balances have become available as a result of borrowing when assets are being built and then, at the start of the service period, large projected initial balances have been available, which are not necessarily a good thing or value for money for the public sector.

Specific provisions on openness, which could be brought in and would not harm anybody, would do

a great deal in terms of improving value for money in the long term.

Mary Fee: That might be something that could be included in strategies and reported on, which I will come on to in a moment. Before I do, does anyone else wish to comment?

Duncan Osler: Such openness across the piece would have a significant impact. That is a question for review and accountability scrutiny.

Barry White: I have two quick but important points to make. In the additional investment NPD programme that we manage, we have moved to a presumption of publication. The old-style contracts included a presumption of confidentiality; people had to state what they were willing to publish, but we have turned that around. We ask what it is that is so confidential that it cannot be published; there should be very little, if any, such information. Such knowledge remains a competitive advantage for a small number of years, but after that time the advantage lapses.

We absolutely agree with the need for openness. We have moved much more to such a footing, which is the right thing.

Jim Cuthbert: That indicates that it can be done and should be incorporated in the bill so that other bodies to do likewise.

Barry White: That is one change that we have made, and it is a positive one. This issue really is not about PFI versus NPD. Although that is a worthwhile discussion, it is not one that I want to get involved in today.

On creating and sustaining jobs, public bodies are making a huge effort on sustainable investment by saying that procurement must have a wider impact than simply building an asset for the public sector. That approach is already being taken.

Perhaps Christa Reekie has some particular thoughts on the sustainable procurement aspect of the bill.

Christa Reekie: The matter is tricky because it must be read in the wider context of non-discrimination. That is a good principle to have, so we must discuss matters very carefully so that we do not fall foul of it.

Mary Fee: Continuing on the theme of transparency and proportionality, how can contracting authorities ensure that any action that they take under sustainable procurement does not conflict with the general duties under section 8?

Christa Reekie: That comes back to the point that I just made. It is really important that we discuss the issue, because the resulting guidance will be important for authorities.

Mary Fee: Should the bill contain further guidance?

Christa Reekie: It definitely should. As you have quite rightly identified, a discrepancy could arise and we must ensure that none of what is done falls foul of the general procurement tenet.

Mary Fee: Do the rest of the panel agree?

Jim Cuthbert: Yes—I think so. I should point out that the bill's financial memorandum says that there will be no extra cost to the public sector in implementing the bill. However, if it is to be done properly, there will be a need for extra guidance, and more monitoring of annual strategies and so on, which means that extra costs that are perhaps not reflected in the financial memorandum are likely to be incurred.

Duncan Osler: It is difficult but important to balance the conflicting measures. A discriminatory regime will have a significant cost to Scotland because contractors will be put off engaging. We must not discriminate overtly.

We should also bear it in mind that the European reforms are likely to abolish contracts being awarded on the basis of price; instead, they will be awarded on the basis of what is called the most economically advantageous tender. We are therefore moving towards a slightly more fluid regime, but things must be transparent and balanced. Of course, that requires authorities to understand and think through at an early stage what they are trying to achieve with the procurement.

Margaret Cuthbert: That last comment is very important. I believe that in the first evidence session the convener raised the question of training and how to get a good person in procurement. For our last study, we went round quite a number of European countries to find out how they procure. It was very obvious that they do not allow the tail to wag the dog; in other words, procurement departments do not determine much in the way of the conditions on the product that is being procured. Instead, the department that needs the item spends a lot of time defining what it wants, and it is those definitions that determine the competition at the end of the day.

For example, if a waste water works—say, in Leith—needed a contractor to supply spare parts within 12 hours, one would probably get a company that was based in Leith, or thereabouts, to do it, rather than a company in Holland. We have been finding out an awful lot about how contracts are specified and who carries out procurement. There is the end body that Alastair Merrill was talking about, but the procuring department has to be given much more say in how it is done. That approach has been missing since at least 2006, when the big problems were to stop

corruption, to get value for money and to get a cheap price.

We need to turn things around. As I have said, we have a golden opportunity to spend much more time on the bill and to put in place a system that is not protectionist and that does not go against EU regulations, but which also favours the development of the Scottish economy. If you do not take hold of those matters, you will be taking £11 billion out of the economy and using it as if you had no concern for the livelihoods of the people in Scotland.

Duncan Osler: Robin Crawford's "Review of Scottish public sector procurement in construction", which was recently published, specifically mentions the importance of design-led procurement and early thinking. The cost of good design thinking relative to outturn construction spend is relatively small, and the earlier the client body thinks about what it wants to procure, the social approach and the various other impacts, the more procuring officers will be helped in achieving a clean procurement. Such an approach would also comply with the provision in section 9(2) of the bill that the contracting authority should consider only "matters that are relevant" to what is being procured. That is obviously essential and a matter of good governance.

12:00

The Convener: But are the two of you not directly contradicting each other? I thought that we were supposed to be moving towards outcomes. Surely the procurer needs to engage with bidders to find out how the product in question can best be procured; after all, the procurer does not have all the answers but, if some of the bidders are involved in looking at the outcome that people want from a particular tender, savings can be made and better goods, services, designs or whatever can be procured. Are the two of you not expressing two different views on the matter?

Margaret Cuthbert: I did not think that I was being contradicted at all. In fact, what has happened in the past—

The Convener: But you suggested that the contract should be very detailed at the beginning of the process.

Margaret Cuthbert: It should be very detailed about what the people actually want. After that, you will be open to the supplier's views on how best he or she can meet what you want. We do not want projects to be determined mostly by the availability of finance or by large multinationals coming in and determining on the basis of the supply side what they can deliver. With that kind of approach, you end up with the Edinburgh royal

infirmary rather than something that matches the needs of the people in Lothian.

Jim Cuthbert: I do not think that anything Margaret was saying was inconsistent with the possibility of having pre-competitive dialogue with potential tenderers, in which you can bring on board the industry's ideas in working out the specification that will eventually go out.

Duncan Osler: It is about clarity not detail and about being clear at the outset about what is required strategically. Indeed, that might require an alarmingly small paragraph. Engaging with contractors to find a better, market-led solution might be appropriate in certain circumstances and not in others; it is a case of horses for courses, but the authority needs to think about what it wants to achieve at the outset of the process.

Barry White: First of all, I absolutely agree with Margaret Cuthbert that the cheapest price and value for money are very different things.

On Jim and Margaret Cuthbert's previous point about breaking down contracts, I think that if people wanted to adopt such an approach, the capability in the public sector would have to change enormously. For example, in Amsterdam, a waste treatment works that was procured through a whole lot of small contracts, with the municipality acting as the integrator, went way over budget because the interfaces could not be managed. Changing the public sector's capability in that way could never happen very quickly and, as a result, we have to rely on main contractors for integration. Indeed, that has been a long-standing part of public sector—and, for that matter, private sector—procurement.

I do not think that public bodies are unaware of the value for money versus cheapest price issue. I have to say that, from working with health boards and local authorities, I do not see people going for the cheapest price. Indeed, those who have seen the recently opened Lasswade and Eastwood high schools will know that they are of fantastic quality. A quandary that might arise is that one could say that those schools were built by a Dutch company—BAM Construction is headquartered in the Netherlands—but the fact is that BAM bought a Scottish-based company, is a huge investor in the training and development of staff in Scotland and is a long-term committed player in the UK and Scottish construction market. In my view, these companies are a very beneficial part of the Scottish contracting market and add a lot back.

My final point is that, in the vast majority of cases, procurement in public bodies is led by someone who cares hugely about the end product rather than a faceless procurement official. Having spent years in the private sector, including seven years with Morrison Construction, I know that the

people who are doing the procuring are in the education team or the health team and are not faceless bureaucrats who are just looking at numbers. I do not recognise that, either from my current side of the fence working for the SFT, or from my previous existence on the other side of the fence as a supplier to public and private sector procurers. The picture that I see is very different from that.

Mary Fee: Do the witnesses agree that the provisions regarding the production of procurement strategies and annual reports will be beneficial? Is there anything else that you would like to see in there?

Barry White: I am very positive. The production and publication of a procurement strategy makes clear what people are trying to achieve. It is always good to pause and think, and that is what such a strategy would do. It would make people think, and that ties in quite well with the recommendation in the construction procurement review about the publication of pipelines and making clear not just what the strategy is but what the future workload is. Those two separate bits of work marry up together very well.

Duncan Osler: As I tried to say earlier, strategies are important, but the better ones will also refer to the wider strategic aims of the bodies and will inform their overall purpose. To some extent, they will also refer to the measurement of the social and environmental impact and the delivery on some basis or other.

Jim Cuthbert: Strategies are potentially very important as long as they are not just tick-box exercises. Alastair Merrill's reply on that point was rather weak. The strategies are going to be published, but we cannot really look to the public to do a detailed scrutiny of them that will make sure that they hang together and are meaningful. The public sector will have to put substantial resource into picking up those strategies on some sort of a rolling programme and making sure that they go beyond just being mere tick-box exercises, or they will end up being largely meaningless.

The Convener: Is that not an issue for the audit committees of the various bodies?

For the record, I say that Mr Osler is nodding.

Jim Cuthbert: It might be, but the bodies need to have the expertise. We want someone with expertise in best practice to look at a particular strategy and say whether it is best practice. The audit committee in a particular body might well not have that expertise.

The Convener: We move to part 3 of the bill, on specific duties.

Jim Eadie: I have a general question to ask first, which builds on what we have just heard.

Right at the start, Mrs Cuthbert said that public procurement contracts in Scotland generate a value of £9 billion to £11 billion. Has any of the witnesses done any research on the proportion of those contracts that stay within Scotland and the proportion that go outwith Scotland? I was interested in what Barry White had to say—in the end, does it matter? As he said, contracts that are given to companies outwith Scotland can generate economic activity in, for example, the construction industry in Scotland.

I also want to ask Mr Osler what is feasible and possible within a European procurement framework if we want to award more contracts within Scotland.

Duncan Osler: On the last point, the introductory remarks of the European procurement directive that went through the European Parliament many years ago talked about strategic procurement as an aim. You might think that that means something other than just the pure economic competition that is public procurement. Strategic procurement refers to something other than awarding on a level playing field purely on the basis of bid offerings. It is difficult to see how extensively articulated strategic procurements that work towards deliberate aims that are not expressed by reference to the social or economic activities that will be delivered on the ground in Scotland will be lawful. In other words, procurements must always be pegged back to what will happen in Scotland and the impact of that; to the extent that they would look at what bodies will win the contracts, it is difficult to do.

You should be aware that, as I understand it, your question is of interest to members of the Parliaments right across Europe. It is being considered at the highest level.

I hope that that is a helpful answer. I cannot give you figures for the proportion of public contracts in Scotland that are awarded to economic operators based outside Scotland. I do not have that information.

Jim Cuthbert: I agree that it is difficult to say how many there are. Our original Jimmy Reid Foundation report, which we published in 2012, looked at some of the difficulties of measuring. We looked at some particular examples of sets of contracts that had been let. We were quite clear that, in a number of cases, the penetration by Scottish firms was fairly small. To give an example of the difficulty of measuring, one of the points that we picked up in the report was on framework agreements that are organised by central purchasing bodies that perhaps originated elsewhere in the UK. There might be a very good reason for that if you are turning to an overall UK body that has some expertise, but a significant number of the framework agreements organised

by Advanced Procurement for Universities and Colleges Ltd—APUC—apply in Scotland but originate with regional purchasing bodies elsewhere, such as the south-east of England regional purchasing body.

When we looked at those contracts, we found that the penetration of Scottish companies was almost nil. If the south-east of England regional purchasing body issues an invitation to tender for a framework contract, a Scottish company is not likely to apply, even though that agreement might later be applied in Scotland. What is worse is that such a framework agreement will never appear in any of the statistics in Scotland; neither the origination of the framework agreement nor the call-off from it will appear. Quite a lot of agreements can therefore go out under the radar.

Does it matter how much comes to Scotland? Yes, absolutely. If we want to develop the Scottish economy, we will want to use the procurement spend to develop a vibrant Scottish economy, rather than have the spend going elsewhere. I am not saying that we should be protectionist. We were unfairly criticised by Vivian Leacock for being protectionist. We are absolutely not protectionist. What we said was that much more could be done within the scope of the EU procurement directive to take into account, for example, the quality of service. Margaret made the point about the ability to replace a part quickly. I believe that, in Italy, for procuring food, they use cultural requirements that local food must be used, and so on. There is an awful lot that could be done. There are complete exemptions in the EU directive, for example for the procurement of research and development, that could be used but are very much underused.

It is therefore possible to do a lot more here of what is done elsewhere.

Barry White: My point is that it matters where the pound eventually rests. We are very keen to see the money being spent on local workers and local trades. The difference that I am stressing is that what we define as being Scottish is quite important. For example—I do not want to single out one firm—it could be a company headquartered in the Netherlands that also has an English headquarters but which has been in Scotland for an incredibly long time and has a very strong Scottish workforce. In the example that I am thinking of, the company has two headquarters in Scotland; it has its UK property development business—

Jim Eadie: Is this the same example that you gave earlier?

Barry White: Yes. The Dutch company BAM Construction is one example, because BAM Properties is a UK-wide part of the company that is headquartered in Glasgow and BAM Facilities

Management is also headquartered in Glasgow. They bring a lot of jobs and investment into Scotland. I disagree with Jim and Margaret Cuthbert's view that they would not count as Scottish firms.

Jim Cuthbert: No, we never said that.

Barry White: You gave the example of Morrison Construction not being a Scottish firm because it is headquartered in the south-east, as is Galliford Try. I used to work for Morrison Construction, so I can tell you that it is very much a Scottish firm. It is important to say that we look at firms that are committed to Scotland. On defining Scottishness, we are very keen to see public sector contracts going to firms that are committed to Scotland, which includes firms that might be headquartered and owned in Sweden or the Netherlands. However, the question is whether they are committed to training and developing people in Scotland, retaining skills in Scotland and developing those skills. That is what we look for.

Christa Reekie: I have a quick point. On the national frameworks, as I said, the fleshing out of the regulations and the guidance are very important. If a local authority is under threat of being challenged under the bill, which will give the private sector remedies, the natural instinct will be for the local authority to avoid that by just using national frameworks. That is why it is important to flesh out the regulations and make it easy for authorities to know what they are supposed to do and how they should set about it. Otherwise, authorities will just avoid it and go for national frameworks, which might not give us the outcome that we really want.

12:15

Margaret Cuthbert: I will respond to the first question, on how much of the work stays in Scotland. Jim has already pointed out the problem that we have with the framework programmes, but I would also highlight that the public contracts database is inadequate. It is extremely good for the purpose for which it was set up, which is matching demand to supply, but it is not good as a database, because of the things that it does and does not include.

The bill team said, for example, that 43 per cent of spend goes to SMEs, which raises the question—as Barry White has just said—of what constitutes an SME. We tried to find out how much money went to SMEs in Scotland, and we were told that a good bit of it did. However, that raises the problem of definition, and the question of what is a Scottish SME. As far as I can gather, a Scottish SME could be a small business of two people who are merely here carpet-bagging. It will be difficult to work out what should or should not

be regarded as a Scottish SME. Following on from Barry White's point about Morrison Construction, I happen to have looked at the board members of Galliford Try, and I saw that there was no Scottish representative. That was my point: how can one regard a company that has no Scottish representation on its board as necessarily able to look after all of Scotland's interests?

Apart from that, everybody has different views on what a Scottish business is. Our database is not adequate to determine the point in which Jim Eadie is interested, and nor are our definitions of what would be Scottish.

Jim Eadie: I may incur the wrath of the convener here, but I will move on to community benefit if I can. The provisions in the bill stipulate that the community benefit requirements should apply to all contracts above £4 million. Does the panel think that that is an appropriate threshold? I would also like to hear your views on whether you broadly agree with the bill's provisions on community benefit, and whether you see any particular strengths or weaknesses. If you see any weaknesses, how could those be strengthened?

Barry White: If someone wants to get funding for the NPD programme, they already have to have community benefit clauses in their contract. The £4 million threshold is close to the EU procurement threshold, and it is a reasonably sensible level. Below £4 million, a lot of that happens automatically anyway because the degree of travel would be much smaller. The community benefit requirements place a burden on the main contractor to comply, and the necessary administrative and support effort can be sustained more easily on the larger projects.

I agree that the threshold is about right. I would like Margaret Cuthbert—without incurring the convener's wrath—to congratulate Ken Gillespie, as a resident of Glasgow, on being promoted to the Galliford Try board.

Margaret Cuthbert: It is about time, too.

Jim Eadie: You got that point in, Mr White.

Margaret Cuthbert: Might that have been due to my intervention?

Barry White: He may well thank you for it some day.

Duncan Osler: The strategy that must be provided specifically includes a component on community benefit, but the bill does not say that it must be reported on subsequently. You might wish to link that up. Effectively, the threshold is at a sensible level. It is a burden that would need to be considered, and we do not want to put too many additional requirements on authorities.

Jim Eadie: Do you think that the provisions in the bill and any associated regulations and guidance are adequate to address the issues of blacklisting and the inappropriate use of zero-hours contracts? I am conscious that we have not yet seen the guidance and regulations.

Barry White: Without seeing the guidance, we cannot be certain.

There is a general principle that sits behind that response. A range of factors may prevent people from working, such as convictions or unsatisfactory performance. The calibration of that is really important because someone may be doing a great job on building a motorway somewhere but a less good job of building—

Jim Eadie: When we talk about blacklisting, we are talking about people who have been blacklisted for, for example, trade union activity. Can we address that specific point?

Barry White: Until we see the guidance, we do not know—that is all that we can say at this stage. The intent is there but it really depends on the specific measures in the guidance.

Jim Eadie: And zero-hours contracts?

Barry White: Speaking as someone whose wife has a zero-hours contract, which suits her enormously, I will say that it depends on the specific guidance.

Margaret Cuthbert: On the question about community benefit, I, too, am no expert on this, but I want to comment on the way in which we organise procurement and the way in which the hubs work.

We are subcontracting quite a lot. It has become clear this morning—if it was not already clear—that, by allowing big companies to be our first port of call and being happy to have other businesses subcontracting to them, we are acting like Pontius Pilate and washing our hands of what is going on in those smaller companies.

If we organised procurement entirely differently, we would have more say, as a public body, over what goes on in those SMEs. I do not know how we would do that, but back in the 1970s, for example, there was common practice in local authorities up and down Scotland. I take it that most of them would have been Labour. The practice was very different. You could walk into the Labour town hall and get a list of what was coming up. As a small contractor, you could automatically put in your name, and there could be 20 or more small businesses working together.

It is not beyond the wit of man to get small, professional businesses in Scotland to work together instead of always having to go for the big companies, such as the ones that Barry White has

been talking about. In many cases, we are talking about big construction companies such as those involved in the Forth bridge. If we really are interested in improving Scotland's economic future, we need to consider carefully the big contracts and the boundary at which we start to think about whether big business is needed. That is where we should be putting a lot of our time. Can we engineer ourselves a bit differently so that public bodies are more directly involved and have more control?

Gil Paterson: My question relates to EU law. Questions were raised earlier about the minimum wage and the living wage. In Scotland, there is an ambition to do much more on the living wage, but we seem to be prohibited in what we can do. I should say that that is my negative view, but is it wrong? Does anyone have a silver bullet for circumventing what I see as a barrier to the use of procurement rules to implement the living wage for subcontractors? I am asking less about contractors, as I think that there is already maybe some leverage with them, although it may not stand up in law or any kind of tribunal.

Jim Cuthbert: I do not think that I have any wisdom to contribute on that, because the area puzzles me. I looked at the Barnier letter and tried to follow up the EU regulations, but I just got lost and could not understand what was going on. What puzzles me is how Boris Johnson seems to be getting away with it in London. I would like to know why there seems to be a difference in approach between London and Scotland. I simply do not know. I have no wisdom to contribute on the matter.

Gil Paterson: I think that I can answer the Boris Johnson question. It is London weighting: it is written into statute that wages can be increased in the geographical area of greater London—not London—but the approach cannot be used anywhere else in the United Kingdom.

Duncan Osler: I understand that, in the European Parliament discussions on finalising the European procurement reforms, quite a number of MEPs focused on the issue and that there were many discussions on how cross-border terms and conditions would be dealt with. It is not just a Scottish matter, and I do not have any silver bullets.

Margaret Cuthbert: In Europe, Scotland is a relatively small country. At least since the end of the 1980s, we have, certainly at the local authority level, gone for central purchasing units in which we have expanded the size of the projects that have gone out for contract, and we have lost out tremendously by doing so.

For example, I know that, when the Scottish Office building was being built down at Leith and

the contract for furniture went out, at least 10 companies in Glasgow—the furniture specialist companies and so on—were very willing to put forward a bid to furnish the new building together, but it was not even considered. The public sector was unwilling to consider some bundles that were being put together or to help people to work together.

I know that the approach has changed in some areas, but the public sector needs to spend far more time thinking about the size of our country, the size of businesses in our country, and how the £9 billion to £11 billion that it is spending can be more appropriate to the size of the units of our businesses. Otherwise, we are ripe for project after project going to larger companies, from which we then get the subcontract—which is what is happening.

Barry White: There is no silver bullet from us, unfortunately.

Gil Paterson: Okay. Thanks for that.

The Convener: Are there issues to do with the financial stability of companies—how that is measured, whether companies are capable of taking on contracts, and whether they might go bust halfway through them?

Barry White: I certainly think that there is a need for public bodies to be proportionate when they are setting any thresholds in considering the right size of company to do the work. That is a general principle that we believe in, and we think that it is important that people in the public sector get that right.

I think that sometimes there is a risk of people being excluded by accident by the setting of a test that they might fail. Therefore, it is a matter of being proportionate and choosing the right range of reference projects in order not to be too narrow and to allow a wider range of local companies to take part.

There are things that the public sector can do. The construction procurement review picked up a number of themes to say that we should not exclude people who have the capability to do the work. However, by setting thresholds incorrectly—not necessarily incorrectly; rather, without due thought—we could do that by accident.

The Convener: That can specifically exclude social enterprises and assisted employment organisations, for example, can it not? There is nodding all round.

Finally, part 4 of the bill is on remedies. Is the remedies regime for sub-EU threshold procurement necessary, and are the provisions appropriate?

12:30

Duncan Osler: Yes, the regime is necessary. Without the provisions, the regime could be disregarded with relative impunity and contractors would not necessarily have confidence in it.

That said, it is worth noting that, even with a fully regulated procurement, it is an expensive business for bidders to undertake litigation, as it is a difficult and problematic thing to do. Without part 4, on the rare occasions when litigation were undertaken, the regime under the bill might be seen as less robust.

It is difficult to envisage many situations in which the remedies would actually be used, but measures short of remedies, such as complaints and other engagement, might serve to support the regime and the behaviours.

The Convener: In the earlier evidence session, I asked whether 30 days is an appropriate length of time in which to bring proceedings. In your experience, is that length of time appropriate for companies that want to question the award of a tender?

Duncan Osler: Thirty days is a short period. It would be difficult for bidders to bring challenges in that short period.

As to whether there is a large number of bidders who bring proceedings to preserve their rights before the time expires, I suggest that there have not been many such proceedings because of the very high cost involved in raising such proceedings in Scotland. Down south in England, where the litigation procedures are different, there may be more such cases, but in Scotland there are fewer because bringing legal proceedings is a significant step to take not only for a company's reputation but because, potentially, it might incur significant costs as the party bringing proceedings.

The Convener: You need not go into the issue now, but could you perhaps give us a brief paper on why the cost is so much greater in Scotland?

Duncan Osler: I could follow that up, yes.

Christa Reekie: I am perhaps making the same point over and over, but it may be worth making it again in this context.

Particularly considering the regulations that ministers will issue on how people can exclude certain tenders, tenderers might want to challenge things if the legislation or guidance is not very clear. Tenderers will also be more likely to challenge a decision to exclude them if their exclusion involves a loss of reputation. If a company is excluded, the message will get round that it has been excluded for certain things, so it might want to challenge a decision much more.

The list of challengeable actions includes compliance with section 24, which is to do with guidance. If the guidance is not specific, it may be easier—or more difficult—to challenge decisions. You need to look at what is an actionable breach.

The Convener: Margaret Cuthbert mentioned that Germany breaks down its contracts. Has any work been done to find out whether breaking down contracts into smaller bundles adds cost? If so, how much does it add to the cost?

The final question, unless anyone else has other questions, is on whether there is evidence that some countries sail closer to the wind in complying with the EU regulations and directives. If that is the case, can we have examples?

Margaret Cuthbert: Let me answer the second question first. In Scotland, we do not sail close to the wind at all and we are very risk averse. That is quite obvious from what we see in Europe, where other countries are being challenged all the time. That should make us think whether, if procurement has such a huge impact on the Scottish economy—between £9 billion and £11 billion—we are disrupting the Scottish economy by being so risk averse. There is evidence that we are not anything like as challenging as we could be.

The Convener: I have heard that Wales sails close to the wind in its procurement. Is that correct?

Margaret Cuthbert: Yes, Wales sails close to the wind.

Sorry, what was the first point that you raised?

The Convener: I asked how much additional cost is involved in breaking down contracts into small bundles, as happens in Germany.

Margaret Cuthbert: On that issue, we know that research and development projects will have up-front costs, but we should look at the potential that they provide for establishing important building bricks in Scotland for the longer term.

We would also like a different way of looking at procurement. Instead of thinking in the way that we do just now about, for example, putting up a bridge—with regard to what the value added would be, for example—it would be better if we could do a bit more work and consider not just the cost of having smaller companies involved but the potential long-term return. The Government should be a risk taker on that.

Jim Cuthbert: It should not be assumed that small contracts are always dearer. Certainly, some people in publishing, for example, hold strongly to the view that the existing large contracts add costs and that if things were broken down and needs were supplied by specialist small suppliers—who

cannot tender for the large contracts—things would be a good deal cheaper.

We came across an internal presentation by a major construction company on PFI, in which the managing director told his troops that PFI was a jolly good thing because tender costs and complexity on large contracts restrict competition. Very large contracts can have the opposite of the desired effect: they can restrict competition and have ultimately higher costs.

It is not purely one way. Small contracts do not necessarily mean higher costs—it can go the other way.

Duncan Osler: The public procurement rules do not tell authorities what they should buy. The European rules simply set out means through which things should be procured, depending on what it is that an authority means to buy. The real focus should be on how an authority decides more clearly what it wants to purchase and the social impact of that.

Like it or not, the purpose of the regime at European level is transparency. The result of transparency—in economic terms, as I understand—is meant to be a regime of fairness, in which people can compete fairly for contracts. Overall, that tends to create competitive prices: it drives down prices and drives up the quality of proposals. That is the architecture that you work within.

I suggest that you focus on what is to be purchased and the strategic aims with regard to sustainable social and economic outputs. If individual authorities focus on those things and you interrogate their strategies in the reporting, you may find over time that you get benefits. I know that, in other countries, those specific measures are looked at by Government and other bodies that are keen to have effective procurement.

Mark Griffin: Has the Scottish Government been too risk averse on the living wage? The Scottish Government wrote to the European Commission to ask whether it is possible to implement the living wage, but could it have taken an alternative approach and declared that the public procurement policy of the Government and Parliament is that the living wage should be part of the bill?

Should the Government have simply asked the Commission how to do it, rather than whether we have permission to do it, on a similar basis to the route that the Government has gone down on minimum unit pricing for alcohol? Could we have been much further forward if the Government had been less risk averse and more aggressive in pursuing that policy?

Barry White: Asking for forgiveness rather than permission is sometimes a good strategy, but when dealing with the European Commission it is probably advisable to seek advice, as we do on matters such as state aid. The downside of getting it wrong could be significant and expensive and could cause a lot of delay. If we are going to introduce something as a Scotland-wide policy, it is sensible to take that sounding.

Mark Griffin: My understanding is that the letter to the Commission asked whether we could do it rather than how we could implement it. What do you think the benefits of both approaches would have been?

Margaret Cuthbert: The question of how should have been addressed here—we should know that before we ask the question. I suggested one way forward, which is involvement of the public sector in a much greater range of contracts, instead of so many going directly to larger businesses that then subcontract.

Barry White's model would not necessarily need to be changed. We need to put our minds to how we can influence the second tier, instead of having the Government pass contracts out to companies that then subcontract. I cannot do this, but I am sure that Barry White could: we ought to be able to work out how we can bring smaller companies more into the earlier stages, so that the Government makes its intention clear in a direct relationship with those smaller companies, instead of going through all these processes.

In fact, when we first saw the way in which the Scottish Futures Trust or the Forth bridge were working, it seemed clear to us that the Government was washing its hands of some of the malpractices that could take place further down the line.

Barry White is your expert on how one ought to be able to take smaller companies much more on board.

The Convener: You should have the right of reply on that, Barry.

Barry White: The best thing that I could say in response relates to how we have recently been working with local authorities to complete two schools. We have done an analysis of where the work has gone for that, which we are happy to share with the committee in a written response. We do not measure whether or not we are sailing close to the wind; we measure what the outcomes are on the ground, what percentage of work goes to the local area and what percentage goes to SMEs. Both those projects have extremely good statistics.

We measure those outcomes on our projects, but—in response to one of the earlier questions—

we do not have a picture of what is happening right across Scotland, because we are not involved in every project. Where we are working, that is exactly what we are looking at, and the outcomes that we are seeing are positive. We measure that rather than the degree of closeness to the wind.

The Convener: Duncan, did you want to come back on the legal aspect of the living wage and the EU?

Duncan Osler: I think that I covered that in my earlier remarks.

The Convener: Right. As nobody has any other questions, I thank witnesses for their evidence. It has been extremely useful.

12:41

Meeting continued in private until 13:09.

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