



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

Wednesday 13 November 2013

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INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE
22nd 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:

Karen Bowman (University of Edinburgh)

Dorothy Cowie (Scotland Excel)

George Eckton (Convention of Scottish Local Authorities)

Sylvia Gray (Sustainable Scotland Network)

Colin Sinclair (NHS National Procurement)

Susan Torrance (Scottish Federation of Housing Associations)

Angus Warren (Advanced Procurement for Universities and Colleges)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

Committee Room 2

Scottish Parliament

Infrastructure and Capital Investment Committee

Wednesday 13 November 2013

[The Convener opened the meeting at 10:02]

Procurement Reform (Scotland) Bill: Stage 1

The Convener (Maureen Watt): Good morning, everyone. I welcome you to the 22nd meeting in 2013 of the Infrastructure and Capital Investment Committee. I remind everybody to switch off their mobile phones and other devices, as they affect the broadcasting system. Some members of the committee will be looking at their papers on tablets, which is why they are allowed to access them.

Before we begin agenda item 1, I acknowledge the very positive announcement last week by the Minister for Transport and Veterans on the £1 million fund in this financial year for the replacement of community transport vehicles. As members know, providing such a fund was a key recommendation in the committee's community transport inquiry report. I think that members will agree that that announcement, taken with the doubling of funding for the Community Transport Association and other positive Scottish Government responses, represents a very positive outcome of our inquiry for the community transport sector.

Agenda item 1 is the Procurement Reform (Scotland) Bill. We will hear evidence from a range of bodies that represent contracting authorities and organisations. The format is a round-table discussion, which is intended to allow the free flow of discussion. There will be no opening statements from witnesses, who will be asked to introduce themselves and state their organisations. That will be followed by an open discussion, perhaps prompted by questions from committee members, on various provisions of the bill. We will try to work through the sections of the bill as far as possible.

We have a wide range of witnesses from different sectors, and we hope that our questioning will cover cross-cutting themes. To make the best use of our time, I ask the witnesses to avoid restating in detail points they agree with that have been made by other witnesses. I emphasise that, if anyone feels that anything has been missed during the session, they can follow up the matter in a written submission.

I ask people to briefly introduce themselves and to say whom they represent.

I am the convener of the committee.

Karen Bowman (University of Edinburgh): I am the director of procurement at the University of Edinburgh, and I have worked in public procurement in Scotland for 30 years.

Mark Griffin (Central Scotland) (Lab): I am a member of the committee.

Angus Warren (Advanced Procurement for Universities and Colleges): I am the chief executive of Advanced Procurement for Universities and Colleges, which is a centre of procurement expertise and the representative body for procurement for the higher and further education sectors across Scotland.

Mary Fee (West Scotland) (Lab): I am a member of the committee.

Dorothy Cowie (Scotland Excel): I am the director of Scotland Excel, which is the centre of expertise for all 32 local councils.

Alex Johnstone (North East Scotland) (Con): I am another member of the committee.

George Eckton (Convention of Scottish Local Authorities): I represent the Convention of Scottish Local Authorities.

Sylvia Gray (Sustainable Scotland Network): I am the sustainability and energy officer at East Dunbartonshire Council and chair of the sustainable Scotland network, which I represent here today.

Gordon MacDonald (Edinburgh Pentlands) (SNP): I am a member of the committee.

Susan Torrance (Scottish Federation of Housing Associations): I am the policy manager of the Scottish Federation of Housing Associations. I am representing our members, which range from 20-unit Abbeyfields to Glasgow Housing Association. There is a wide range of size and type of organisation, but they are all housing associations.

Jim Eadie (Edinburgh Southern) (SNP): I am the MSP for Edinburgh Southern and a member of the committee.

Colin Sinclair (NHS National Procurement): I am director of national procurement, which is the centre of expertise for procurement in NHS Scotland, and I am representing the 22 health boards.

The Convener: And this is Adam Ingram, the deputy convener of the committee.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): Sorry I am late, convener.

The Convener: We will try to go through the bill section by section, but I will ask a first question of all the witnesses. What do you think the overall impact of the bill will be on your organisation?

Susan Torrance: A number of our members are extremely concerned about the bill. We had sounding-board meetings throughout October. Obviously, the bill was published in good time for us to talk through some of its implications. Although we are still wrestling with the idea of being included within the European Union thresholds, we now suddenly find that we will have another set of thresholds and another set of duties and obligations. People are finding it difficult to understand what that will mean in terms of costs and how they organise their businesses. There is a great feeling of things being imposed on them, rather than their seeing that some of the measures will assist their procurement efficiencies.

The Convener: Do any of them use the portal at the moment?

Susan Torrance: Yes, they use the public contracts Scotland portal, but they choose to do so because it assists their businesses. However, they do not like the idea that they are to be swept up or, indeed, remain swept up with other organisations. There is quite a complicated legal reason why housing associations are deemed to be public contracting authorities. Measures that are applicable to the national health service, NHS trusts, universities and local authorities will be imposed on very small housing associations, many of which are charities working in the third sector that use every penny that they have to assist tenants and move forward their social and community objectives. They regard some of the procurement measures as being bureaucratic, bringing extra cost and causing them difficulties.

The Convener: Okay. Anyone else?

Karen Bowman: We were very appreciative of the original consultation on the bill. A lot of the areas that we had concerns about were taken into account in the bill. Angus Warren can speak on behalf of the whole sector, but our university still has concerns about a couple of key issues. Our concerns are primarily about the impact on our academic research community's ability to compete for funding in the current year. In the most recent full year, we received £300 million of research funding. However, our competitors in the rest of the United Kingdom are currently being advised that they will not need to apply the European rules, never mind any rules at lower thresholds. Moreover, although we have not seen the final text, we know that the European Union is simplifying and opening up some of the procedures at the higher level of EU thresholds.

We are concerned that our research colleagues will have to undertake extra procedures that they currently do not have to do and that their competitors in the rest of the UK will not have to do, which might mean additional bureaucracy and costs for our university.

Colin Sinclair: From the health service perspective at national level, I think that everything in the bill would be regarded as good practice and what we would expect to do. In terms of a direct impact on my organisation, we hope that we do the vast majority of what is in the bill.

A significant risk is the proportional effect of the bill on individual health boards of varying size and scale. There is also the risk of significant bureaucracy. Does that meet the desire of the bill to promote small and medium-sized enterprises, and third sector and supported business activity? On the other hand, could some of the remedy suggestions have a negative impact? My overriding view of the bill relates to the proportionality of what is being asked of contracting authorities and whether that will support the key principles of the bill. Perhaps there are other ways to do it.

The Convener: Are you saying that the thresholds are too low?

Colin Sinclair: No. I can give an example. Health boards will receive a large number of tenders for a relatively small value of contract. Under the bill, they will be asked to do a significant amount of additional administration and, potentially, hold a significant number of additional meetings. They could end up with threats of remedies and court action. In practice, that might put SMEs off because they might consider the option of going to court if they are unhappy as unaffordable, which would inhibit their ability to get involved. What we had hoped for was a kind of ombudsman approach, and support for SMEs to get better access to contracts and to be able to win contracts.

The Convener: But SMEs would not go to court unless they were unhappy with the award of the contract; they would not go if they won the contract.

Colin Sinclair: No, but there are a couple of issues. One is that an incumbent supplier could go to court for a relatively small amount of money simply to retain the business until any court action issue was resolved.

The other issue is the cost to unsuccessful bidders. A £50,000 contract over, say, four years is £12,000 or so a year for the supplier. If the supplier is unsuccessful and feels that the process has not been carried out properly, the cost of going through a court process and remedies process will probably put them off complaining and

may not drive the improvement in the procurement process that is the bill's intention, and which we all support.

The Convener: But what remedy does a supplier have now?

Colin Sinclair: At the moment, they have a remedy through the single point of inquiry. We have suggested—as have others, I think—an ombudsman approach and a more proactive strategy in which the public sector goes out to support SMEs on how to complete contract tender documentation and how to have the best chance of being successful in what is ultimately a competitive situation. In such a proactive approach to our suppliers, rather than leaving it so that, if they are unhappy, they potentially go to a court solution—which, for reasons of cost, may be prohibitive—we would build a relationship with them and help them to fill in tender forms and understand the issues that they have.

The Convener: If there are more bidders for the contracts, does that not mean better use of public money because you are likely to get a wider range of bidders and possibly a more competitive situation on price?

Colin Sinclair: There is a practicality issue here. If a procurement organisation has 40, 50 or 60 bids coming in for a relatively small contract, it has to go through each offer, understand it and do all the administration that goes with it. A number of companies may not be capable of doing that in the first place, so the risk is that it adds to administration and frustration rather than taking it away. It would not necessarily give a more competitive situation.

The Convener: Is that not what the pre-qualification questionnaire is all about?

Colin Sinclair: The PQQ will endeavour to do that. The standard PQQ will ask a range of standard questions, but in most procurements you then have to ask some specific questions. If there is too much focus on the standard questions, everybody will get through the PQQ, which is a risk that we need to consider. It is another issue of proportionality.

Dorothy Cowie: I echo Colin Sinclair's comments in relation to the impact on my organisation, Scotland Excel, given the nature and high value of the contracts that we do. The implication is not significant but, just as Colin Sinclair said, concerns have been raised about the impact on local councils. The Scottish local government procurement forum, which is the forum for all the heads of procurement, has submitted some evidence. Those concerns mirror the points that Colin Sinclair has just made.

10:15

Angus Warren: I will explain where we think some of the challenges are around the remedies. Although going to a full court case can take a lot of money, a process can be stopped very quickly in the sheriff court for a few hundred pounds. One of the challenges there is that, if an incumbent supplier was going to lose £50,000 of business, it could delay the process for a couple of years for an investment of £500, and it could continue to receive the income for a further period of time, even if it knows that it has no grounds.

That is one of the risks with the remedies. At the moment, the remedy is to liaise with the contracting authority, then go to the single point of inquiry, and then go to court to seek damages. However, that ability to stop the process could be very damaging, particularly if, to go back to Karen Bowman's example, it was for an urgent piece of high-profile research, which was stopped for a significant period of time because of a small challenge in a sheriff court. In that scenario, the researchers would most likely take their research outside of Scotland to another university. Research is mobile; it goes with the researcher and not with the institution, so that is a high-risk area.

The Convener: On that point, you were involved in discussions with the Government prior to the bill being published. Have you been given any commitment that an exemption for contracts in pursuit of research or experimental development will be given?

Angus Warren: We have not had a commitment as such. The Government has said that it has given serious consideration to exemption.

We are concerned about research because it is so essential for the wellbeing of the Scottish higher education sector, which is very successful. It is an asset to the Scottish nation in every area of teaching and research, knowledge transfer, spin-outs and so on. It is way above the rest of the UK at the moment. A lot of that is grounded in the research that is being done and we are concerned that, if we start to do things that could impact on that research, it could have a great effect on the wider situation within universities.

The other thing about our sector is that a significant amount of its income comes from competitive sources. For example, less than 35 per cent of the funding in higher education comes from the Scottish Government. The rest is competitively won. Even in the college sector, 58 per cent of its income is competitively won. Outside of research, the additional work that is required to go through a lot of the process will present the significant risk of making us less

competitive when, as Karen Bowman mentioned, the rest of the UK higher education sector is to come out of the EU procurement rules because of the change to its funding model. Some universities started to come out this year, and the rest will follow very soon once they see the advantages that those that pull out get in procurement terms.

The impacts are quite significant and probably entirely unintended. The challenge is in rolling a competitive sector into predominantly public sector organisations. I do not want to go into too much detail here, because I have submitted a paper.

The Convener: Because of its nature, the bill will be pretty high level and a lot of the detail will be left to the regulations. If the Government commits to giving that exemption, will that cover it?

Angus Warren: It depends on what the exemption says and how widely we can interpret it. We would be very grateful if we could get an exemption for research, because it presents the biggest risk area, but there are other areas that are also a risk because of the additional bureaucracy that will be required.

A challenge is that a lot of the good practice that the regulation and bureaucracy are meant to frame and support is already being done in the sector through individual and sectoral policy. In fact, we are doing virtually everything from an outcomes basis, so we are already achieving good outcomes, and that is happening without the additional cost of the compliance aspects.

We appreciate where the Government is coming from; if I were a civil servant in the procurement directorate, I would probably want to keep things as simple and consistent as possible, too. I also appreciate that, as Karen Bowman mentioned, a lot of the original areas of concern have been taken out of the bill, so the consultation process has been a good and well-managed one. As I say, areas in which we have concern remain. It might be that some measures can be adapted to be slightly more flexible—perhaps the centres of expertise could be allowed to have a slight role in understanding where things should and should not be applied in matters on which we have a more detailed understanding of how the sector works and where competition does and does not exist.

The main concerns relate to the fact that we operate in a competitive environment. It is interesting to look at, for example, the utilities sector, which has a much more light-touch regime. The bill will not apply to that sector; indeed, the main justification across Europe and especially in the UK for exempting it is that it is in a competitive situation. However, the higher and further education sectors are in a far more competitive

situation internationally, and the ferocity of the competition is growing every year.

The Convener: A lot of the competition on research and development is not just between single universities; indeed, universities in Scotland, England, the EU or across the world may be working together. Will they not all be covered by the same EU regulations?

Angus Warren: England will not be covered, so the English universities will be able to come out of the regulations. Many European countries do not apply the EU procurement rules to their university sector, but Britain has done so from the beginning. I have yet to meet anyone from the university sector in other countries such as France, Spain and Portugal who must comply with EU rules even now. A lot of the universities in northern Europe are state owned, so I think that the scenario there might be slightly different.

The danger is that a high level of bureaucracy will lead to additional delays in partnering a university in Scotland. For example, if there are two universities in London, one in France and one in America looking to partner, they will want to go with the ones that can move quickly and start the research quickly and not with those in which there is a risk that the research will be stopped because of a challenge against a minor piece of equipment in the research process.

The Convener: I am sorry, but I am confused. Are you saying that that is happening now?

Karen Bowman: Perhaps I can come in on that point.

In Edinburgh, we have a good reputation for managing—whether it is research funding or private donations—very well and transparently. We apply the public procurement law and the EU regulations at that threshold already. We try to get good competition for our colleagues in the research community. However, the competition is frequently narrow; for example, very specialised equipment is needed.

We do not have any problem with applying the measures at the threshold levels. However, the problem would be bringing down the thresholds to about the £50,000 or the £2 million mark. We have a potential £2 million refurbishment project on one of our buildings to which that latter threshold would apply. We go out to competition at the moment; indeed, we are very happy to do that. However, it is the statutory obligation around the pre-procurement work and also the debriefing work that is not adding value to the university or our suppliers.

On collaborative procurement, it is worth saying that there are people of more than 100 nationalities working in the University of

Edinburgh. They come and go as and when funding flows and they will go wherever it is easy for them to do business. Angus Warren highlighted a worry that the staff are mobile and the research will go with them, and that applies particularly in the UK. We have already had teams move to other universities, and their funding goes with them.

We in Scotland would want to build on the good reputation that we have established. As Mr Eadie and other members have recognised, Edinburgh is one of the world's leading universities and we want to make it easy for people to come here and carry out research and easy for suppliers in Scotland and the rest of the UK to supply us. Anything that makes things more difficult, more tricky or slower will be to our detriment.

However, this is not about trying not to be transparent in the way that we spend public money. I might be wrong but my understanding is that the European regulations that will be changed in the new directives are likely to make it easier for non-central bodies to introduce procedures that we used to have, such as negotiation with and without call for competition and innovative partnerships, all of which will be very helpful to universities. Above EU level, even if the Scottish institutions are still part of the EU procurement rules, the system will be more flexible than it appears to be in the bill. If the regulations that the Scottish Government produces exclude procurement for research purposes, that, too, will be very welcome and helpful but the challenge then for people like me will be that when we procure something we will have to decide whether it is for research, teaching, administration or all three. Quite a lot of things, particularly high-performance computing, have a mixture of applications; microscopes, for example, are used in laboratories for teaching as well as research.

We are most concerned about the impact on Scotland's research economy, but the practical applications of the procedures that are required under the bill will incur additional costs for the university and others in our sector. In the past five years at Edinburgh university, 171 companies have been created mainly in Scotland but also elsewhere. They could be supplying us; however, under the bill, their business will be open to competition at quite a low level, whereas in the past that might not have been the case.

The Convener: We can raise that issue with the cabinet secretary when she comes before us.

Gordon MacDonald: I have a question in the same vein, convener. You said that research is very competitive, but how much of it is awarded on the basis of the wealth of experience that an organisation, university or centre of excellence has? How much weighting is given purely to price in assessments of where research should go?

Karen Bowman: I would like to answer that not only on behalf of Edinburgh university but in light of my 15 years' experience of working in the university sector. Research is very competitive and is assessed on two main factors, the first of which is the research excellence and track record of the principal investigator and his or her team in the academic area in question. In other words, the assessment is based on a peer review of the quality of research. More and more, however, our research funding bodies, particularly with regard to Government funding through research councils, European Union funding and charity funding, are looking for value for money when funding research. As a result, the full economic costs of research have to be bid for and if the University of Edinburgh proved expensive as a place to carry out research because we were less efficient in our use of resources, that would be to our detriment. The weighting in individual cases depends on the specific kind of research involved. Obviously an institution's reputation plays a big part in that and we have been very successful in that respect.

In short, therefore, two factors—academic excellence and what one might call efficiency or value for money—are taken into account. Our track record in conducting £150 million to £180 million-worth of procurement a year efficiently, effectively and compliantly has weight, but the more important element is the academic community and its ability to deliver the research quickly. Indeed, speed is another factor. There is a very short bidding process for what are short-term funding opportunities; after all, the main purpose is to publish research, which has to be done as quickly as possible.

I do not know whether that answers your question, Mr MacDonald.

Angus Warren: Having worked in a university, I know that when researchers thought about going to a particular institution they would ask about agility in managing research budgets and that one of their criteria was having the maximum freedom to make maximum use of a research grant as quickly as possible and in the most agile way possible. This has a knock-on effect far beyond the simple financial impacts; it has an impact on actually attracting and retaining people.

Gordon MacDonald: Yes, but if a university has been looking at a particular area of research over many years, it will have in place the facilities and infrastructure, albeit not the particular individual to carry out the work, so it will already be fleet of foot, as opposed to what you are trying to suggest—that the research would go to another institution that would have to start from scratch or perhaps from a lower base than the university that is a centre of excellence would start from. It is therefore a matter of balance, is it not?

10:30

Angus Warren: By its nature, research is normally leading edge, so it often requires new purchases of equipment, services and knowledge. A lot of very expensive, specialist equipment very often has to be bought for research projects. That is where the bigger research projects are. The knowledge and quality of the research team tend to sell the university's research, and the team is mobile. It could be there for a long time, but it can disappear overnight and take its research with it.

Jim Eadie: What should the appropriate threshold be to ensure that we do not make the environment in Scotland less competitive than that in the rest of the UK?

Karen Bowman: My opinion is that the European threshold is low enough, but obviously that does not help as far as the bill is concerned. I think that the bill's threshold for transparency, adequate advertising and ensuring that we invite competition is fine, but, as Angus Warren has explained, when it comes to the procedures around debriefing and the remedies, it would be very easy for somebody who lost an infrastructure equipment contract to cause difficulties for their competitor who won it. That is the worry. It is a matter of the behaviour of the market as well as the nature of the threshold. We are not concerned about increasing competition at lower thresholds; we are concerned only about the statutory extra obligations beyond those of our competitors in the rest of the UK and the EU.

The Convener: That is interesting. Others will say that the bill does not go far enough on regulation. We have heard that already, and I have no doubt that we will hear it again. Universities are very much in the forefront in discussions about things such as the living wage and zero-hours contracts. It will be interesting to see how the evidence goes as we take the bill forward.

Karen Bowman: I would like to come back on the particular point about wages and contracts. The University of Edinburgh now has no zero-hours contracts. Our policy is to have no zero-hours contracts, and we are working through that.

The Convener: That must be quite new. Is it quite new?

Karen Bowman: Yes, it is very recent. The university has also signed up to the Worker Rights Consortium, which is an American university-led organisation, and is working with Angus Warren, the students association and the National Union of Students Scotland to try to improve a code of conduct for workers globally. That is not just for our own staff but for suppliers. In the university, the 56 per cent of procurement spend that we manage goes to SMEs, and 80 per cent of our

suppliers are SMEs. Therefore, we are encouraging competition all the time.

The Convener: Sylvia Gray has been waiting for a while.

Sylvia Gray: On your original question about the impact that the bill could have, my first point is about the significance of procurement to the sustainability agenda. Procurement covers a broad range of issues—climate change, fair trade and the circular economy, for example. Given the amounts of money that are involved in public procurement, sustainable procurement offers a real opportunity to make a difference on such big issues, and a bill that encourages sustainable procurement is to be welcomed. Obviously, the bill does that, especially through the sustainable development duty and the related community benefit requirement. We are encouraged by that and think that that is a good start.

We have some comments about the specific text of the bill and where provisions could perhaps be strengthened. We will probably get the chance to go into those matters in a bit more detail in our discussion, but one of our main points is that the cross-cutting significance of sustainability should be emphasised in the bill. Sustainability is a central consideration that should cut across the bill, particularly the sections on strategy and guidance, rather than just being mentioned in section 9 under the sustainable procurement duty.

George Eckton: Leaders and senior elected members in the convention were broadly supportive of the bill. The political discussions between my political boss and spokesperson and the Deputy First Minister have been very positive. Previously, the convention's president has made representation on the need for a degree of consistency between the duty of best value on local government as it stands and the duties that will come in via the bill.

There has been a great degree of unanimous support through the convention for enabling public sector bodies to award public sector contracts to companies that pay the living wage. Concerns have been raised proactively with the Deputy First Minister on the impact that the forthcoming procurement directive might have on shared services, and the need for harmonisation between the directive and the bill, to ensure that we do not create two tiers of procurement with conflicting duties and thresholds.

The final point that the convention raised was about not only us as procurers, but what we have to procure for communities, which can be exposed to practices that are not as open to competition as they would be otherwise. For example, the distribution use of system charges that the two main electricity company legacy boards in

Scotland charge councils are semi-regulated by the Office of Gas and Electricity Markets but can be the source of quite significant in-year price increases with little explanation. We have been quite successful in lobbying those down in past years. We made representation that as procurers, sometimes we are exposed to things that we cannot procure or for which we have to pay a cost outwith a truly competitive market.

The Convener: Does Alex Johnstone want to dig deeper, or does he want to ask his questions?

Alex Johnstone: They have almost been answered, but I would like clarification on a couple of things. Susan Torrance touched on something earlier and I would like to ask the question in a simpler form. Section 1 includes an overtly prescriptive list of who the bill applies to and who it does not apply to. Do you have any comments on the list of organisations that are included? Do you feel that any have been excluded inappropriately?

Susan Torrance: I do not see registered social landlords or housing associations in that list, although the Scottish Housing Regulator is there. We are caught under regulation 3(bb) of the Public Contracts (Scotland) Regulations 2012, which gives four tests to do with control and funding—those are the two main things that are used to consider RSLs.

A lot of associations do not receive public grants for building new homes, for various reasons, and we are certainly not controlled by another public authority. We may be regulated and we may be very public about our activities, but we are not controlled. Indeed, housing association boards are not dominated by any contracting authority; they are comprised mainly of unpaid volunteers from various walks of life who serve on them.

I appreciate that this goes back to a 2004 case—the European Commission v France—in which French housing associations were put under the microscope. European tests were applied and the associations were deemed to be public contracting authorities at that point. The UK Government decided that rather than test the issue in Europe, they would accept that RSLs were public contracting authorities and ever since then all four national federations—in England, Scotland, Northern Ireland and Wales—have argued that they are not.

The amount of public grant funding that we are given and the number of associations that are building have decreased. A large number of our members are using their income from tenants to maintain and manage their homes and run their businesses. They feel far more akin to charities, which are not part of the public contracting authority regime. The imposition of procurement duties is far more applicable to large-scale

organisations, such as local authorities and health boards, than it is to voluntary or third sector organisations. I was interested to hear that some universities in Europe are not considered to be public contracting authorities, given that there is no comparison between the scale of their businesses and the scale of the businesses of our members. It seems to me that there are many anomalies.

Our members are extremely concerned that, in addition to the fact that we might have lost the debate on European thresholds, the bill will introduce a lower set of thresholds. The financial memorandum says that there will be no net cost to contracting authorities because they are all doing things such as procurement capability assessments and already have procurement strategies. As far as the Scotland Excel local authority procurement regime is concerned, that is all perfectly true, but it does not apply to 20-unit Abbeyfield Scotland or even some of our medium-sized organisations. They have rules for procurement and ways of running their business, and they are keen to ensure that local communities and local SMEs get the economic benefit that they are able to provide. However, they want to do that as part of the process of running their business and because it is good for their business from the point of view of competitiveness and getting value for money, rather than because they are seen as being akin to large-scale local authorities and health boards, which have multimillion pound budgets.

That was a bit of a wander round the subject, which is highly complex. I cannot see us being listed in the bill or in the regulations, but if we delve more deeply into the issue, we find that it goes back to a Commission case against France in 2004 and the definition of the term “control”.

Alex Johnstone: Does anyone else have any comments about inclusion on that list, or exclusion from it?

I have some brief questions just to clarify a few things. Do the witnesses support the introduction of the new regime for below-EU threshold contracts? Will that have implications for your organisations?

The Convener: Perhaps we could bring in training, too, because it has already been highlighted to us that there is not enough training in the field of procurement.

Karen Bowman: Our team is training all the procurement staff of Scottish Borders Council—they are doing the national vocational qualifications. As well as doing the University of Edinburgh's procurement, we do all the procurement for Queen Margaret University on a collaborative basis.

I feel that the bill has missed an opportunity to place an obligation on public bodies to ensure that their procurement people are trained. I also feel that bodies such as local authorities and enterprise organisations should offer training to new businesses in Scotland so that they understand the public procurement rules and how they should be bidding. They should get training and support to help them to qualify their bids and to bid for contracts that they have a good chance of winning.

There is something missing from the bill, given that the McClelland report and the procurement reform agenda were about improving procurement skills. There is nothing about that in the rules as they are written in the bill. I know that the Scottish Government is investing in training and development—that is a good thing—but perhaps provisions along the lines that I have suggested could be considered.

Alex Johnstone: Are you content with the thresholds that are provided in part 1?

Angus Warren: In the initial dialogue, it was proposed that the thresholds would be aligned with the EU thresholds and that they would be 50 per cent of them. For most public bodies, that would have meant a threshold that was half of £174,000, but the threshold in the bill is slightly less than half of the central Government threshold, which brings much more procurement activity within the scope of the bill.

It would make quite a significant difference to the administration costs of contracting authorities if the threshold were set at 50 per cent of the relevant EU threshold. It would also avoid the need for Government to constantly review and change the threshold, because it would track the EU threshold. That would be the case for both works and goods and services contracts.

The Convener: What would you do differently if the thresholds were different? We all want greater openness and transparency, and we all want to give local firms a better chance to bid for contracts.

10:45

Angus Warren: The challenge in the bill is that, under section 32, the visibility and right to challenge will be extended to all firms across the EU and other places that are not in the EU but are listed in the bill. At present, in Scotland, we can contain that type of business in a local supply market—we can invite local suppliers to bid—but under the bill we will be required by law to advertise such business publicly across the EU, as if it was an EU tender, and in the countries that are listed in the bill, and there will be a right to challenge. The amount of business that will be

competing with Scottish business will increase enormously as a result of the bill.

The further down we take the threshold, the more risk there is of bringing stronger competition to Scottish business and of having the opposite effect to the bill's aim—which we very much support—of encouraging more participation by, and success of, Scottish businesses. We think that the bill will have a negative effect because of the requirement to advertise publicly and the wider ability to bring challenges. That is a real concern; the committee should think that through.

The threshold will introduce competition at a lower level and will require additional work within contracting authorities at that lower level. With a four-year contract, £50,000 is only £12,500 a year, so a lot of very small contracts will be brought within the scope of the bill. I do not know whether that is intended or whether it is just the way the bill has been written. Ironically, because it is the value of the contract that matters, some things could be in the scope of the bill because they involve four single contracts that go above the threshold as well. There is a bit of a crossover that probably needs to be clarified.

Colin Sinclair: When we first looked at the bill, we saw that the spirit was about how to encourage SMEs and ensure equality of access for them, and about how the Government and tendering authorities can work with our supply base so that they have a good opportunity to win business. I am slightly concerned, however, that the bill has a lot of administrative, bureaucratic and, ultimately, legal measures that are negative in that they are about what to do if the process goes wrong, rather than there being a focus on how we can make it go right in the first place.

I fully support the idea of putting money into training. We have things such as the supplier engagement programme. As centres of expertise and procurement communities, we can probably do more to engage with and support the supply base in Scotland. I would be interested in the supply base's view on whether that more legislative framework will work, or whether it would rather have an arrangement that is based more on partnership, training and encouragement. We use the procurement capability assessment to assess our organisations, but we could use it as a model to support Scottish businesses by considering whether they are fit to tender for Scottish public sector contracts, to be competitive and to win them.

George Eckton: When the council leaders considered a paper on the thresholds at a COSLA meeting last month, no issues were raised. There was concern about slight unintended consequences that would have to be tidied up. For example, supported bus services might be handed

back to the contracting authority and might need to be retendered at short notice for a long period, which could take the contract over the threshold. The proposed changes on bus registration might shorten the timescale for doing that.

Also, there is the potential to move from a de minimis threshold to utilising best value. We wonder whether those interactions have been fully thought through, and we have flagged that up with Transport Scotland. That is just an example of where lowering the threshold might make it slightly more cumbersome to react quickly if a service that is socially necessary to promote inclusion, accessibility and mobility—certainly in some of our more rural authorities—is handed back.

Mary Fee: Witnesses have touched on the sustainable procurement duty. Could you give specific examples of the impact that introduction of the sustainable procurement duty will have on procurement practice in your organisations? How will your organisations ensure that the sustainable procurement duty does not conflict with the general procurement duties?

Karen Bowman: I am pleased to say that Edinburgh university is very strong on sustainability and social responsibility. We have had a policy on that for 10 years and procurement is represented on the steering group. We are therefore keen to ensure that procurement is sustainable in all its senses. The university has been around for 400 years and we want to be here for another 400 years, so we are looking at things such as environmental, social and economic sustainability. We do that in all our procurement anyway.

One of the challenges in the bill is in sections 9 and 19, which talk about “the authority’s area”. We are not sure how a university such as Edinburgh university, which has a global reach, would be able to demonstrate compliance with that. I do not know whether that is an issue of drafting or of interpretation of what is meant by considering the sustainable impact on “the authority’s area”. We hope that the regulations will be clearer.

We are working closely with Scottish Government advisers and others on the principle of sustainable procurement so that we can do the best we can with it. However, legal advice that I have been given suggests that it might conflict with current EU regulations if we are trying to drive business towards local suppliers as opposed to opening up opportunities, which we have to do under the treaty obligations on transparency across Europe.

We agree with the principle and the practice, but the wording is one of our concerns.

Mary Fee: Do you think that the wording in the bill should be changed?

Karen Bowman: In my opinion—I will submit it in a written response—the requirement should be related to the authority’s purpose. The university’s purpose is research, education and knowledge exchange, and our strategy references our view of how we can do that sustainably. Our procurement would therefore support that aim as opposed to covering a physical area, which we would have difficulty in defining. Edinburgh university is in four local authority areas and has premises in five continents, so it would be quite difficult for us to know what our “area” is. I do not know whether that answers your question.

Sylvia Gray: I would like to pick up on Karen Bowman’s point about the word “area”. That is one of the key points that we want to make about the bill. Obviously it is important to think locally as a starting point, but being sustainable really means thinking holistically across time and space. In other words, we need to think beyond our own back yard and beyond the here and now.

At the consultation stage, the bill’s text referred to the “relevant area”. We picked up on that and said that we had concerns, but the wording has now gone a step in the wrong direction. As Karen Bowman pointed out, if we are looking only at our own area, we can see how sustainability issues can arise. To give a hypothetical example, most of East Dunbartonshire Council’s waste is landfilled outwith our area; it goes to North Lanarkshire, so in theory, under the bill as it is worded at the moment, we could procure a very wasteful product—a disposable high-volume item that was made of non-renewable resources—but would still comply with our sustainable development duty because we would landfill it outwith our area. That is hypothetical; I am sure that it would not happen in East Dunbartonshire, and I am sure that the bill is not intended to encourage that sort of thing.

It is fair to say that, as a society, we still displace a lot of our impacts rather than address them. If we do not displace them to our immediate neighbours, they certainly go to our more distant neighbours. If we interact with other countries, as we do as a trading nation and a member of the international community, it is our responsibility to pre-empt and avoid negative impacts that arise from those interactions. Through the Climate Change (Scotland) Act 2009 and because we have recently gained Fairtrade nation status, we have made a public and international statement that we recognise that we should be, and want to be world leaders in, demonstrating how to be a good neighbour. It is really important that the bill take that into account.

Susan Torrance: All housing associations in Scotland have sustainability objectives, such as building sustainable homes, sustaining people in their tenancies, sustaining communities and

putting as much financial impact into local businesses as possible.

It is fair to say that many of our discussions about Europe are on how far away we are from any likelihood that housing association business will be opened up to European businesses. An interesting point is that, when I asked at a seminar how many associations had ever received a bid from another European country as a result of EU procurement rules, the answer was that only one had done so. Many more bids have been received from India and China—apparently, some Indian and Chinese companies trawl through public contracts Scotland and the *Official Journal of the European Union*—so, if the treaty objectives were to widen markets and open competition, there seems to have been a failure to realise them.

Sustainability is at the core of what we do, but the bill's requirement to demonstrate that bureaucratically and in a way that is reconciled with European rules is a big concern. That perhaps echoes Karen Bowman's points about how those two things marry together, because they do not seem to do so at the moment. I also support the idea that sustainable objectives should be the rationale behind the requirement to demonstrate sustainability, so we should not just look at "the authority's area". We work not just in local authority areas but Scotland-wide and, in some instances, UK-wide.

Colin Sinclair: The health service is fully committed to the sustainability agenda as part of the triple aim of the 2020 vision for health, which includes the innovation agenda. From that perspective, I have no issues with the bill.

My only concern or comment relates to the notion of the geographical area of the authority. For a national organisation such as NHS National Procurement, our area is Scotland. We need to work closely with our health board colleagues to ensure that we are not driving unnecessary competition between health board areas. For example, we buy food products from Scottish suppliers, but health boards and councils may want to buy from a local supplier in their area. A lot of work needs to be done to reconcile those things to ensure that we are getting the proper sustainability options as well as driving best value. I am slightly concerned about narrowing the focus to "the authority's area". As Sylvia Gray said, we need to take a more holistic view of sustainability.

Dorothy Cowie: I will not go over the same ground, but I share Colin Sinclair's concerns and agree with the points that Sylvia Gray made.

To link back to what the convener said earlier, I think that Scotland Excel can cope with sustainable procurement, but we will need to think about the resources that we put into working with

individual public sector bodies, councils and health boards to ensure that we provide the right training and guidance, which should be funded appropriately. That will make a difference.

In our work with Sylvia Gray's organisation and with the Scottish Government, we have talked about greening the procurement journey and ensuring that sustainability is at the heart of the guidance that everyone follows. That guidance also needs to be properly resourced and invested in, so that those messages are embedded in individual organisations. We need to reflect on whether there is funding to ensure that that happens appropriately.

The Convener: Can you perhaps take a few minutes to explain what Scotland Excel is, how it came about and why it is based in Renfrewshire?

Dorothy Cowie: I would be delighted to do so. We came about as a result of John McClelland's review of procurement in the public sector in 2006. One of his recommendations was that each of the various functions in the public sector should have a centre of expertise, because procurement was being done in a very fragmented way. That was the basis on which Scotland Excel was set up. When we launched in 2008, we had about 25 or 26 councils that were members and we worked hard over the next couple of years to get the remaining councils on board.

We have two key strands to our business. One is to deliver collaborative contracts on behalf of those 32 members. We are currently working to develop contracts worth about £750 million, but councils collectively spend about £5.3 billion a year, so we do not do deal with all of the councils' contracts. An awful lot of that work goes on in individual authorities or through authorities clustering. However, that is the key thrust of our business.

11:00

The second part of our business is to work with councils to help them to get better at procurement themselves. We have worked with them over the past four years on the procurement capability assessments and on moving them up the procurement maturity curve. When we started procurement work, with most councils it was very much a tactical, operational function. We have been working with councils to help them to see procurement as a strategic enabler that helps them to drive best value.

The Convener: Do you specialise in any particular areas of procurement to help councils?

Dorothy Cowie: We work across the range. We undertake a vast range of contracts; we have about 40 contracts in place at the moment,

including very operational contracts that involve all the materials that are used in schools, including musical instruments, mats and wheelie bins. That was the kind of contract portfolio that Scotland Excel started with.

Clearly, though, most of the money that is spent by councils is spent on construction, social care, information and communication technology and, increasingly, waste. We have been moving into those areas over the past couple of years, so our contract portfolio now has a number of contracts that relate to provision of social care, fostering, secure care contracts on behalf of local government and the Scottish Government, and prepared meals. We are in the throes of doing a contract for residential care for children. We are also undertaking some early ventures into the engineering side of things; for example, we have building consultancy and engineering consultancy contracts in development.

The Convener: We have heard in evidence and prior to the bill's introduction that Scotland Excel does not encourage sustainability and localism, and that you actually work against local residential care providers or local charities in providing care for vulnerable children because the contract is done by Scotland Excel and not by local councils. What would you say to that?

Dorothy Cowie: I disagree with that. Scotland Excel must work hard with its stakeholders to manage such perceptions.

We work closely with councils, and all the contracts are structured on the basis that we do not insist that organisations must be able to supply the whole of Scotland in order to participate in our contracts. They are all structured on the basis that if an organisation can supply only Argyll and Bute, for example, then that is the box that it ticks. An organisation does not get fewer points because it can supply only one council, and those that can supply all 32 councils do not get any more points for that.

We try to structure our contracts and our lots to ensure that we do not impact particularly on local SMEs. I will give the committee a really good example of where that structure went even further than local authorities do. One of our contracts is for butcher meat, and we recognised that in Scotland there are a lot of small local butchers, so some local authority areas were subdivided into smaller lots. I think that there were about 10 or 11 sub-lots in Argyll and Bute to ensure that the companies that were providing the council still had an opportunity to participate.

On our commitment to sustainability, I hope that Sylvia Gray will support what I say, which is that we are very committed to sustainability. The Scottish Government's sustainable procurement

action plan had an aspiration that organisations would get to a certain level in the national flexible framework for sustainability. It is a kind of mark-your-own-homework approach to get to level 3. It is a five-stage process, with level 5 being the highest. Scotland Excel has put a lot of work into getting to level 4.

We invited Barbara Morton, who is a well-respected expert on sustainable procurement in the Scottish Government, to come in to check the marking of our homework and we had confirmation that we are operating at level 4, so the fact that sustainability is built into our processes has been externally verified earlier this year. I am not sure how many other organisations have done that, but Barbara Morton referred specifically to the work that we are doing, particularly on contract management, and praised it.

I think, though, that we have a bit of work to do to manage some people's perceptions of what Scotland Excel does.

The Convener: It is not just perception. If the contract for all the local authorities in Scotland is awarded to a UK-wide charity and it cannot provide the services in, let us say, Aberdeen, the people who suffer are the vulnerable children or adults who are supposed to be covered by the contract. The local charity that has provided the service for X number of years at a very slightly higher cost has to lay people off, breaking the link with the people whom it was looking after. The contract is not working for the people for whom it should work.

Dorothy Cowie: I am not sure whether you have a specific contract in mind. To take the example of the residential schools contract on which we are currently working, there has been a huge amount of consultation with key stakeholders to ensure that we understand all those issues and take them into account in how we draft the strategy in future. I am not aware of us having displaced any charities in any of the contracts that we have developed to date.

Gordon MacDonald: A couple of small companies spoke to me about the Procurement Reform (Scotland) Bill. Their comments were in a similar vein to those that the convener has made. A number of companies that had contracts to advise a large number of individual local authorities on flooding suddenly found themselves excluded as soon as that service was rolled up into Scotland Excel and presented as one contract. The level of expertise that they had gathered over a long number of years was therefore lost.

Those companies were concerned about the measure of value for money. Part of the issue was that an hourly rate comparison was used that did

not take any account of specialist knowledge or efficiency. Those companies might have a higher hourly rate but, because of their specialist knowledge, they could complete the contract more quickly. However, that was not reflected in the frameworks.

In addition, they found that small companies were being measured against large multinationals. They were of the opinion that the contract should be split so that there would be an allocation—perhaps 30 per cent—specifically for SMEs. They also felt that SMEs should be measured against SMEs, and international or national companies against national companies, to provide greater scope and opportunity for SMEs to come on board rather than be squeezed out, as seems to be happening under Scotland Excel.

Dorothy Cowie: I am very aware of the circumstance that you mention. A lot of detail sits behind that, and I am not sure that this is the appropriate forum to go into it. Our responsibility is to ensure that we provide SMEs with an opportunity to tender. There is then an obligation on them to ensure that they submit competitive bids. I am happy to give you some information on the background to that particular case, if that would be helpful, because it is a well-rehearsed example.

Under the legislation, we are not able to allocate specific proportions of our contracts to SMEs. Therefore, there is an obligation on us as a procurement community to ensure that we structure contracts in such a way that SMEs have a fair crack of the whip.

George Eckton: On what local authorities are doing to stimulate sustainable procurement, COSLA and Scotland Excel had detailed discussions over the summer about how we can support the emergence of the circular economy within Scotland and further the zero waste agenda through how we procure our waste services. Those discussions also concerned how we offer opportunities for SMEs in Scotland to access the agenda that Mr Lochhead and Mr Swinney seek to promote, which is about trying to make use of a greater amount of our resources within Scotland, treat them within Scotland, keep our waste, turn it into resource and offer economic opportunity. Councils are trying to work through procurement on that.

On the original question about the sustainable procurement duty, when members have considered the matter through various executive groups within COSLA, the overriding view has been that they do not oppose it, but they feel that, given that we already have a general duty under the Climate Change (Scotland) Act 2009, any duty that is introduced should not be contradictory to that, hamper us in any way or cause unintended

consequences. Members spoke quite unanimously at convention of their strong support for sustainability, procurement being a key tool to promote that. That is recognised through endorsing the voluntary Scottish climate change declaration and seeking to achieve our local and national targets for carbon reduction and sustainable procurement.

I finish with a comment on training and the transposition of the EU directive. We have been made aware that the UK Government might allocate funding on that basis to local authorities and relevant bodies, and we have been lobbying through our Brussels office for a fair share of that funding to come to Scotland if that happens.

Sylvia Gray: I want to pick up on Dorothy Cowie's point and also to reflect what George Eckton has said. On Scotland Excel collaborating with the sustainable Scotland network, I confirm that Scotland Excel has had long-term involvement in the sustainable procurement working group, which sits within the SSN. We have had some fruitful discussions and events over the years on both training and contract development and monitoring, and recently we have been working on the personal and protective equipment contract.

We have been advised that what we have done with that is quite groundbreaking, in that we have written in a requirement for fair trade or ethically sourced items to be made available, which represents quite a turning point in supplier and buyer understanding. We are excited about the opportunity that we have had through Scotland Excel to do that, and as I said we have been told that it is pretty groundbreaking not only at the UK level but in Europe. We are working with ICLEI to develop a case study based on what we have done.

Of course, there is scope to do more—there always is with sustainable procurement. For example, there is scope with both the circular economy agenda and the training agenda that George Eckton and Karen Bowman mentioned. However, to go back to the question, I think that the bill could help us in that regard, especially if the suggestions that we have made are taken into account.

Angus Warren: We very much welcome the drive to support innovation. A key thing is to make maximum use of the increased ability under the new directives to use a formal process for developing innovation in the supply chain. There would be value in putting something into the bill to allow a degree of discretion around advertising where people are dealing with innovations, because that would allow contracting bodies in Scotland to work with local companies that have great innovations without putting the business out

to a European competition. That would allow incubation at least for the first run of the contract. If there was something in the bill that mirrored the new concession in the European legislation, that would be useful in supporting SME development.

The Convener: That is in the bill, is it not? There is the sustainable procurement duty.

Angus Warren: Yes, but it does not give people the ability not to advertise their requirement in the public domain. At the moment, if an SME comes—

The Convener: But that would mean that you would be deciding which people might be innovators. You would not open it up to other people who might be innovators.

Angus Warren: It is a balance. Do we help to incubate local organisations that are developing things that might be new technologies, or do we put the information in the public domain and allow anyone to bid? We need to consider what is best for the local SME community. I argue that having a degree of protection, at least for the first let of an agreement, would help. Obviously, people would have to be able to justify that in a court of law if it was challenged, so they would have to be careful not to use it as a reason not to publicly tender things. However, organisations in Scotland are definitely developing innovations that the public sector could help to incubate, at least for the first let of the agreement.

11:15

Karen Bowman: I agree in principle, but the challenge for our sector is that we are the place where a lot of these innovations begin. In some cases, the university might have some of the intellectual property rights or have partnered with an investment angel to set up a company. If that company's opportunity is opened to competition, the concerns that Angus Warren has mentioned could come into play. That said, there are of course legal exemptions for such things.

A lot of work is going on in Scotland on innovation centres. In fact, in one such centre that we are hosting, we are working with the NHS and Glasgow School of Art on interpreting the current law and ensuring that we invite companies to bring their innovative ideas into a kind of open forum before we end up closing off procurement and competition. The situation is more complex than it might seem and it is important that the bill does not prevent such work at a lower value of spend than we are currently able to do at a higher value.

Mary Fee: That discussion was very useful.

I apologise if you have already covered this, but do you welcome the provisions to publish procurement strategies and annual reports?

Colin Sinclair: Very much so. We need to be very open and transparent about the issue; indeed, we have recently developed a strategy for procurement as a function in health instead of the 22 health boards—as well as ourselves—putting together their own strategies. We need to provide contract registers, and contract plans should help suppliers to see what is coming along the chain, to make forecasts and to consider what they might be interested in. That said, people should understand that strategies and contract registers can change and contract plans can vary slightly. The issue is covered in the bill.

My only other comment is that instead of requiring 22 health boards to write a strategy and produce a report we might want to look at doing that work as a health community to cut down on administration and provide something that is more meaningful and joined up for health as an entity. In principle, however, we welcome the provisions.

Dorothy Cowie: I agree. One of the benefits of such an approach is that it will help to dispel some of the urban myths that I have mentioned. Because of our structure, most of our information is in the public forum but it would help if it and everyone else's information were in one place.

The Convener: Can I take it, then, that everyone agrees that annual reports are a good thing?

Susan Torrance: My only comment is that, because of the size and diverse nature of our organisations and because this is part of a procurement regime that we have not adopted in the way that local authorities and health boards have, our members would find it extremely difficult to write some standard procurement plan or strategy that every member could adopt. As a result, it would impose an additional burden on us. However, we have no problem with publishing information.

Sylvia Gray: I agree that annual strategies and reports would encourage transparency and accountability and that such a move would be a good thing. However, as has been mentioned, there are measures that impact on people's procurement activities, including reporting and monitoring. Dorothy Cowie mentioned the procurement capability assessment, and it is important that the bill acknowledges the PCA as a way of already holding local authorities to account with regard to sustainable procurement. Moreover, we should use the PCA's flexible framework mechanism as a starting point. I should also mention the climate change declaration monitoring that all local authorities carry out and which we are considering building procurement monitoring into. From that point of view, some flexibility would be welcome.

Karen Bowman: We are already doing some of that work. For example, we publish our overall procurement strategy at the highest level as well as our sustainable procurement risk assessment, which complies with the flexible framework; the outcomes are reported as part of our sustainability strategy.

As we have said, some of these things are subject to commercial confidentiality and I know that the bill contains the right in such cases to withhold information in debriefing.

Perhaps there should be some wording around strategies, just to deal with the odd exception when we might not want to make public something that is planned to be procured, such as a new piece of infrastructure for a competitive research project. That would be an exception, because the general procurement strategy is published.

Angus Warren: We strongly support that. Publishing strategies is important and we strongly encourage it. That is widely done across our sector, so it is not so much a change, although the timing might change. That is a good aspect of the bill.

Jim Eadie: We have covered a lot of the issues that I wanted to raise, but I will clarify some points in relation to the specific duties on contracting authorities that are set out in part 3. Witnesses have mentioned that potential additional burdens of bureaucracy and cost might be placed on contracting authorities, and I would like to understand where those challenges lie.

We have talked about the thresholds. Do you see placing all contracts on the public contracts Scotland register as one of the additional burdens?

Angus Warren: That is a relatively minor aspect—putting on a contract is the simple bit. There are knock-on impacts on resources from some of the work before that, such as the duty to undertake local economic impact assessments before going to market and placing an advert.

Putting a contract on the register will increase significantly the number of organisations that will take part in the competition. In theory, that is a good thing, but it will also massively widen the field of people who bid for business, although I will not go over that ground again. We will have to deal with that and with the impact of the debriefings, but I will not go into that, as Colin Sinclair mentioned it.

Jim Eadie: You feel that we have covered that.

I want to run through my points fairly quickly. The requirement for contracts above £4 million to comply with community benefit requirements is not an issue, is it?

Karen Bowman: I have taken legal advice on the issue. My concern is that that figure is above the European goods and services threshold. The committee will need to consider with its legal advisers what it will mean if we bring in a community benefit requirement for goods and services contracts that does not quite fit with current European law, although European law is expected to change.

The proposed threshold is close to the EU works contracts threshold, so it will not affect our view on works contracts. However, if we were buying goods—for example, if we were to spend £4 million on stationery, although we would not do that—would we need to consider community benefits?

Jim Eadie: From what people are saying, I am not quite clear whether the requirement to comply with community benefit requirements for contracts above £4 million presents a challenge.

Karen Bowman: It is fine for works contracts, but my opinion is that it would be better for goods and services to be linked to a goods and services threshold. There is a little confusion, but perhaps it can be sorted out in the final drafting.

Angus Warren: The fundamental principle is that the bill intends the threshold to apply to works contracts, but that needs to be made clear.

The challenges in relation to community benefits will relate to contracts of between £4 million and £10 million. Any such build would have quite a short duration, so there would not be time to put in place sustainable community benefits such as apprenticeships. In such situations, people sometimes employ apprentices for the few months of the build and then dismiss them, which means that they get nowhere and cannot complete their training. It would be valuable to have a national body that co-ordinates apprenticeships, so that all the small builds can be put together and an apprentice can go from job to job.

The Convener: There is such a body—it is called the Construction Industry Training Board.

Will universities not benefit from the provisions through their students going out to civil engineering contracts, for example?

Karen Bowman: A large number of our students already go to graduate placements and are employed in all sorts of industries. We would not worry about community benefits, but if the provisions relate to works contracts, that needs to be clarified. As Angus Warren said, how the industry manages the requirement is an issue, but it is a positive measure.

Angus Warren: We would support the measure.

Jim Eadie: Just to be clear, you think that the potential additional burdens arising from the bill are the fact that the thresholds will bring procurement activity that is not currently within the scope of regulations into the scope of the bill; the requirement to provide debriefing information; and additional burdens that will flow from putting information on all contracts on the public contracts Scotland portal. Those are the main issues for you.

Angus Warren: Yes.

Jim Eadie: Are there any others?

Karen Bowman: I think that there is a way round the problem. There is a positive action that could be taken. The procurement contracts portal could be amended to give a rapid debriefing to companies online whereby they could log in and see a quick checklist that could show whether they had failed on price, quality, service or whatever. That could be followed up with a freedom of information request on specifically what they want, and they would get the answer in 20 days instead of having to wait for a longer period. There are ways to make things simpler, more beneficial and less bureaucratic, instead of trying to fulfil a full EU-type analysis for every bidder.

To highlight what Angus Warren said, in the years I have worked at the university the number of bids, even on lower or EU-level tenders, has been growing. We sometimes have 80 companies bidding, although only one will win.

George Eckton: I think that council leaders hugely welcome community benefit clauses. However, I think that their main concern was that the wording of the bill should not onerously prescribe what they do and that they should be able to reflect local circumstances. The council leaders supported community benefit clauses, but they expressed the wish that we lobby further on the retention of flexibility, given the range of circumstances that exist across councils.

Susan Torrance: Community benefit guidance has been in existence since about 2008. Providing apprenticeships and employment to local folk is at the core of what our members do. However, the confidence to do that and understand how that engages with EU treaty obligations is the biggest concern. Our members saw the bill as an opportunity to specify things in greater detail and give greater clarity and confidence so that they could then incorporate community benefit clauses, because that is what they would like to do.

The Convener: Gordon, do you think that your question on recyclability has been answered? Do you want to take it further?

Gordon MacDonald: Well, we can give the witnesses a chance to answer it.

Part 3 of the bill contains an amendment to the Climate Change (Scotland) Act 2009 that will give ministers a power to make regulations to ensure that a certain proportion of goods procured by contracting authorities are remanufactured or reused goods. What impact would such regulations have on your organisations? What effect would they have on the use of recycled and recyclable products?

George Eckton: When our members considered the power previously, there was general support for it, given our support for the climate change declaration. I think that the support is qualified slightly depending on the type of goods and services concerned. For example, if we have to procure recycled computers, there is the question whether they will have the fastest processors and enable us to do the work that we want to do. In timber procurement, though, councils very much want to see recycled and reused materials coming forward.

Councils support the part 3 proposal, but I suppose that the detail of the regulations could have exclusions for certain goods and services. However, given the circular economy discussions, there might be a mechanism to enable excluded goods and services to be reused and recycled in other economic development. There might be secondary impact through procurement as well.

Karen Bowman: We already recycle and reuse products in the university, so they stay in a sort of cycle economy. I cannot remember the exact percentage, but a large part of our furniture is reused, for example, and computers are cascaded within the university before they are offered for resale to charitable bodies or are dismantled in a way that allows the components to be reused. As part of addressing climate change, we are also very keen to ensure that we minimise waste, and we have been very successful in doing that.

As long as those who are making the regulations consult procurement and technical specialists on which elements can be procured through recycling, and they take account of things such as the United Nations Marrakech approach, which is a way of looking at sustainability in the whole—one of the worries is about whether the way in which reusing or recycling is managed is sustainable—and the regulations are not too prescriptive, it is a positive thing.

11:30

Colin Sinclair: A number of things that I was going to say have been said. The health sector would generally support the principle of recycling.

The key point for us is that we engage with our stakeholders and the users of products before we buy anything for them. We need to ensure that

what we buy is fit for purpose and, as long as we can meet that criterion, recycling will be positive.

The general point is that the devil is in the detail of how, once the bill is passed, it is enabled from there. The key is to work with the Government so that it understands that and makes it workable and not too onerous. That applies to a number of the bill's elements.

Angus Warren: As long as the provision takes account of recycling categories and is done with expert advice on each category, it is welcome. It would also be useful to have a stepped set of targets so that it is clear where people should be aiming over a number of years so that they can start to plan and buy things now that can be recycled or refurbished at the end of their life.

The Convener: Whole-life procurement.

Angus Warren: Yes.

Sylvia Gray: I agree with all the various good points that have been made, but I just want to pick up on Karen Bowman's point about recyclability and the fact that recycling is at the bottom of the waste hierarchy. If we are talking about minimising the impact of waste, we should really reduce it first. In other words, we should try to not use items at all, but if we have to use them, which obviously we do in a lot of cases, we should think about reusability and keep recycling as the second-last option to landfill.

Adam Ingram: We have already discussed the remedies regime and the issues that the witnesses have with it. I would like to turn that around and ask how it can be fixed. How would you adjust the remedies regime for contracts that are below EU thresholds? Would you just take them out altogether? I think that Colin Sinclair said that there was a suggestion about an ombudsman being appointed for that role.

Colin Sinclair: We have a single point of inquiry at the moment, which is a formal process that allows suppliers to raise a complaint without having to go down the route of legal recourse. That complaint will then be followed up and the centres of expertise are responsible for investigating the complaint and feeding back. That has worked well in some cases and not in others. Perhaps it needs more power and to be able to go to the authorities that are consistently complained about and start questioning their processes and what they are doing. Perhaps the way to deal with the problem is to tackle it with authorities that might not be contracting appropriately.

As I said earlier, the other issue is about whether we turn that around and have more robust supplier engagement and management processes that encourage and work with suppliers of education programmes and so on. I am not sure

that small suppliers see the ability to go to court as a solution because, if they lose, they could end up spending a lot of money on a relatively small value contract. We need to find something to encourage SMEs rather than give them an option that might not be in their interest or might not be favourable to them.

Angus Warren: I support that view. The single point of inquiry, which predominantly focuses on activity that is above EU thresholds, although it does not necessarily have to do that, has been a well-respected solution that is run by the Scottish Government. It is trusted by the suppliers and contracting authorities, and it gives people a balanced outcome from their concerns. It must have avoided suppliers wasting tens of millions of pounds on cases that they would have lost. It is certainly a very good remedy process. Beyond that, the law already allows those who have genuinely been mistreated to seek damages and, obviously, that legal remedy would continue. Certainly the single point of inquiry has a valuable—indeed, essential—role to play with regard to remedies.

Karen Bowman: I support the comments that have been made. All I would say is that the investment that the Scottish Government and all the sectors have made in the reforms since 2006 with the introduction of centres of expertise has made it easier for suppliers to find out why they have been unsuccessful. They are now able to approach a central body—or, in the case of a procurement carried out by one of my team, me—and know that the information that they will be given can be used when bidding for future contracts. We are better at debriefing suppliers than we were many years ago because of the knowledge that we are in a procurement community. After all, if someone debriefs a supplier in a way that might not be accurate, they would be in a position to challenge that when they bid for something else. The procurement reforms have at least had that desired effect.

As Angus Warren has said, companies can still take legal action for damages but, as you have heard, we are worried about vexatious attempts to stop a competitor winning business.

Adam Ingram: So one of our tasks is to roll back from the regime that the bill is seeking to establish.

Karen Bowman: I think so, and we need more open communications without necessarily having statutory detail.

Mark Griffin: We have already heard about particular sectors that you think should be excluded from certain parts of the bill. Are there any sectors that should be covered by it or any

enhancements that might be made or further provisions that might be added?

Alex Johnstone: I am tempted to answer that question myself but I will come back to it at a future meeting. [*Laughter.*]

Angus Warren: One particular issue is whether the bill's scope should include UK Government bodies based in Scotland and other publicly owned bodies such as the Royal Bank of Scotland. I know what the answer is but I think it worth while to ask the question.

Karen Bowman: I have a couple of suggestions that we will put in a written response about not necessarily bodies that should be covered but other issues that might be included. On training and skills, which have already been mentioned, we feel that Scotland's business development communities should be required to invest in helping SMEs with public procurement. They already have an obligation in that respect, but I think that it could be made stronger.

Moreover, given that Edinburgh is Scotland's first Fairtrade university, we think that there is an opportunity to put a bit more emphasis on the International Labour Organization's standards or other aspects of behaviour with regard to procurement and services through people.

Finally, there should be some obligation on the supply community to be more transparent in its pricing and breakdowns of margins. I realise that that is very much guarded as a competitive element, but if the public is spending money with a company they are entitled to know a little bit more about various elements of price, delivery and cost to allow us to be more efficient and work together.

George Eckton: It might not be described as an organisation, but the leaders of councils in COSLA were unanimous in their view that the living wage should apply to all procurement activity. Although they recognised the existing legal issues and frameworks, there was cross-party support for doing something and, at best, encouraging the payment of the living wage through the procurement of public services and works.

Mark Griffin: What are the implications of the proposed ability to exclude bidders from your organisations?

As an enhancement to the bill, could an obligation be imposed on companies that bid for contracts to pay the living wage? Companies could be excluded for blacklisting or the use of zero-hours contracts. Would the witnesses support the bill having another provision whereby bidders for contracts could be excluded from contracts if they did not pay their staff the living wage?

Angus Warren: As the law stands, bidders cannot be excluded on those grounds. We must

be careful to ensure that we do not make Scottish businesses uncompetitive in comparison with businesses south of the border. Even if we had the legal power to include such a provision, we would need to think about whether it would suddenly make a Scottish firm 15 to 20 per cent more expensive, with the result that a company in Carlisle would win the business. That would be a possible practical implication.

We would also need to think about the geographical areas in which the living wage should be imposed. For example, should a company that makes things in India pay the Scottish living wage? I would support as many organisations as possible paying the minimum wage, but it is an extremely challenging issue to deal with.

George Eckton: On the living wage, I reiterate that council leaders accepted the legal framework. They are looking at ways of encouraging its adoption through the drafting of the bill. I think that it seeks to say that account can be taken of levels of remuneration when that might affect the quality of goods or services that the company is likely to provide. We have had detailed discussions with the civil servants who drafted the bill over a number of months. Their clarification was that, legally, the living wage could not be insisted on under the EU treaty, because it would be above the minimum wage, which would not be legally permissible.

That said, leaders asked whether we had examined every possible opportunity. Reference was made to the Welsh Assembly trying to utilise community benefit clauses to pay the living wage, but there was not a technical discussion about the legality of those potential approaches at the political meeting.

Colin Sinclair: I would like to comment on the ethical dimension of the issue. It is probably not a procurement question. The concern is that, as Angus Warren indicated, we are competing in world markets, particularly in health. Many of the products that are provided to the health sector are made by multinationals and pharmaceuticals. We are talking about products such as health technology products. There is a risk that we might make Scotland uncompetitive. How would we manage and administer something that involved a minimum requirement when we buy from all across the globe? That is a practical consideration, rather than a comment on the living wage itself.

Dorothy Cowie: George Eckton said what needs to be said on the living wage. We comply with the political direction that we get.

I come back to the issue of exclusions. Anything that the bill can do to give us a bit more clarity

about what we can and cannot do to exclude people would be extremely welcome. That is a very grey area at the moment.

Karen Bowman: I would like to comment on exclusions. In the procurement policy forum, we have discussed at length what information procurement officers and managers are expected to get from the likes of the police. If companies have been involved in criminal activities or blacklisting, how can we get hold of information that would enable us to exclude them if they have not been formally charged? We do not know whether that is relevant. It might be the case that we just cannot do that and that only companies that have broken the law can be excluded.

We responded on the living wage in the original consultation. Colleagues have mentioned a number of the challenges that are faced. Earlier, we talked about apprentices. Will people who are employed by companies such as decorators who work a certain number of hours on a public job and a certain number of hours on a non-public job get different rates of pay? In a way, it would be better if we could exert influence to make the minimum wage a living wage. That would bring it into line with the International Labour Organization standards.

11:45

Susan Torrance: Housing associations support the payment of the living wage, but we would need to be careful to consult the many charities and voluntary organisations that supply services to us. They employ staff, whom we expect to be properly remunerated, but there is huge concern in the third sector about the impact that the bill and the thresholds will have on how housing associations and charities and support organisations will work together in the future. That is an additional issue on which we would need to consult those organisations closely.

The Convener: As my colleagues have no further questions, I thank all of you very much for your evidence, which has been most helpful. We will take it into account when we write our stage 1 report. As I said at the beginning, if there is anything that you think that you missed, please write to us.

11:45

Meeting continued in private until 11:54.

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