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Pàrlamaid na h-Alba

Official Report

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

Wednesday 11 December 2013

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INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE
26th 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:

Duncan McNeil (Greenock and Inverclyde) (Lab)

Paul McNulty (Scottish Government)

Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

Committee Room 2

Scottish Parliament

Infrastructure and Capital Investment Committee

Wednesday 11 December 2013

[The Convener opened the meeting at 10:00]

Procurement Reform (Scotland) Bill: Stage 1

The Convener (Maureen Watt): Good morning and welcome to the Infrastructure and Capital Investment Committee's 26th meeting in 2013. I remind everyone to switch off mobile phones and BlackBerrys, as they affect the broadcasting system. However, some members might consult their tablets, because they have their papers on those devices.

Agenda item 1 is on the Procurement Reform (Scotland) Bill. We will hear from the Cabinet Secretary for Infrastructure, Investment and Cities and her supporting team of Scottish Government officials. This is the final evidence session on the bill before the committee considers a draft report in January. I welcome Duncan McNeil, the convener of the Health and Sport Committee, who has joined us for the evidence session.

I welcome Nicola Sturgeon, the Cabinet Secretary for Infrastructure, Investment and Cities, who is accompanied by Scottish Government officials Paul McNulty, head of procurement policy and development; Bill Watt, bill team leader; and Mark Richards, solicitor and branch head of commercial and business services. I ask the cabinet secretary to make some opening remarks.

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): As we all know, Scottish public bodies spend about £10 billion every year buying things, so the decisions that they make when they spend that money are enormously important to businesses, the third sector and the economy as a whole. In recent years, we have made significant progress through our approach to procurement, but most people accept that there is still room for improvement in how the public sector buys goods, works and services.

It is important that we strive to strike the right balance between being business friendly and addressing social and environmental needs and aspirations. The bill seeks to be business friendly by standardising processes, streamlining bureaucracy and encouraging innovation and to

be socially responsible by looking at the broader economic implications of procurement decisions.

It is important that we build in considerations such as community and environmental benefits at the start of the process and not as last-minute add-ons. We need to set clear standards for the conduct of public procurement and to make clear the importance of good business ethics. The bill will establish a national legislative framework for public procurement that is business friendly and socially responsible.

I stress that the bill does not sit in isolation; it is part of the bigger programme of reform that we embarked on in Scotland after the publication of John McClelland's report in 2006. That programme has led to the development of what is increasingly referred to as the Scottish model of procurement, which seeks to maximise the contribution that procurement can make to our economic prosperity. It sees procurement very much as an integral part of policy development and service delivery, and it looks to use the power of public spend to deliver genuine public value in purchasing. The value-for-money triangle—of cost, quality and sustainability—is central to the Scottish model of procurement, and economic, social and environmental sustainability must be at the heart of what we do.

The bill will place a small number of general duties on public bodies in their procurement activities. For example, there is a duty to act without discrimination, in a transparent and proportionate manner and in a way that is best designed to improve the economic, social and environmental wellbeing of the area in which bodies operate. The bill also provides specific measures that are aimed at promoting good practice in procurement.

Like the committee, I have heard a lot of discussion about the issues that the bill should address and how it should address them. Members will no doubt recognise the strength and depth of feeling on various aspects of the bill from different stakeholder groups. Striking an appropriate balance when dealing with views that are in some cases diametrically opposed has not been without challenges. However, taken together, the package of measures in the bill achieves the appropriate balance in responding to those views while retaining the flexibility to cover the diverse range of goods, services and works that our diverse public sector procures.

Importantly, the bill is flexible enough to support the wide range of policy and service delivery for which the public sector is responsible. We recognise that special circumstances apply to some types of contract, such as health and social care contracts or contracts that universities and colleges need to award in support of research and

teaching commissions, and in both those areas we are committed to addressing the concerns that have been highlighted in evidence before the committee.

We believe that making procurement spending work better for Scotland has enormous potential to contribute to our economic, social and environmental wellbeing and that it can help to ensure that Scotland remains in the vanguard of innovative public procurement, which will enable the best outcomes for Scotland. The bill helps us to work towards those goals, and I am keen to hear the committee's views as part of the on-going scrutiny process.

The Convener: Thank you. I invite Mark Griffin to start the questioning.

Mark Griffin (Central Scotland) (Lab): I will touch on some of the points that you made about tendering for care and support services. A lot of the evidence that we have received has thrown up problems with tendering for those services being driven by cost rather than quality, which is driving down pay and conditions for workers and causing a high staff turnover rate in the companies that provide those services, and problems have been raised with the obligation on a public authority to retender for work at the end of a contract, which creates issues at the point of delivery, because a person might be used to a specific provider. What is your view of the opinion that some in the third sector have expressed that care and support services should be exempt from such competitive tendering?

Nicola Sturgeon: I listened carefully to that evidence and I have read a lot of the evidence, which I have a great degree of sympathy with. I come from a background of being health secretary, so I know from first-hand experience how such issues can arise. Before I answer the question directly, I say for the record that, as I pointed out in my opening remarks, cost should never be the sole factor in making such decisions. I spoke about the cost triangle; it is important to bear it in mind that cost, quality and sustainability must operate in concert.

On the specific points that Mark Griffin raised, I am aware that there are special issues that mean that it would not be appropriate to require competitive tendering for health and social care contracts. However, when an authority chooses to hold a competition for such services, it is important that some provisions in the bill would continue to apply. It is also important that an authority's procurement strategy—we might go on to talk about procurement strategies in more detail—and its contracts register cover health and social care contracts.

Having listened to the evidence, I can make it clear that we intend to lodge an amendment at stage 2 to exempt health and social care contracts from the provisions in the bill that relate to advertising and competition. I hope that that will go some way towards addressing the concerns that have been raised, but I shall pay close attention to the committee's report in determining whether we can take further steps as the bill progresses.

Duncan McNeil (Greenock and Inverclyde) (Lab): Given the focus that the Health and Sport Committee and I have had, I welcome the cabinet secretary's position, as it stops the merry-go-round that puts a lot of pressure on the third sector. I presume—perhaps I should not do so—that the Scottish Government recognises the negative impact that the procurement and commissioning process can have and has had on the outcomes for people in receipt of social care, despite the objective of making genuine attempts to balance good value with good quality, which she mentioned—unfortunately, it does not always work that way. Will she confirm that the Government accepts that the procurement and commissioning policy can have a negative impact on the outcomes for people in receipt of social care?

Nicola Sturgeon: I have listened to and recognise some of the concerns that have been raised. Our obligation is to ensure that the procurement regime does not lead to such undesirable outcomes. We would all accept that, when a public authority is procuring paper clips or other stationery, to take a random example, or, at a much higher level, when it is building new facilities, it is crucial to apply the rules that are laid down in the bill and the European Union rules for higher-value contracts. When an authority chooses to go out to competition for a health or social care contract because it thinks that that is the right approach, the rules on transparency and non-discrimination and so on should apply.

The issue arises in the mandating of that competition, which is why the amendment that I spoke about, which will make it clear that health and social care contracts are exempt from the provisions in the bill that relate to advertising and competition, is important. The short answer to your question is yes, I recognise the concerns. As we do across a range of areas, we will address them as responsibly as we can.

Duncan McNeil: Has that been an objective? For the purposes of one indicator—I do not know whether you will examine other areas—is it an objective of the Scottish Government to use the bill to address some of the issues that were raised by Audit Scotland, the Health and Sport Committee and the Local Government and Communities Committee in session 3? What other measures or amendments will address the

Government's policy and good-quality outcomes for people in receipt of social care?

Nicola Sturgeon: I will make a few points in response to that. First, we have published extensive guidance on securing care contracts. There is a question about the extent to which that guidance is followed in all cases and there are issues for us in ensuring that public bodies follow it.

As convener of the Health and Sport Committee, you will be as aware as I am, as the former Cabinet Secretary for Health and Wellbeing, that we have inspection regimes and quality assurance regimes across the health and social care system, which should operate to ensure that, regardless of how services come into being, the quality that they provide is appropriate. The Health and Sport Committee has previously applied a lot of scrutiny to that.

On the specifics of the bill, I have spoken about the amendment that we intend to lodge. I dare say that, in our discussion this morning, we will consider the duty on certain authorities, if they are procuring contracts above a certain value in a year, to publish procurement strategies. That is designed to force on public authorities the discipline of looking in detail at what they are trying to achieve through procurement. One aspect of that is consultation with relevant stakeholders who are affected by procurement. That brings to bear some important factors in the discussion.

I have said what we intend to do at stage 2. I am not closing my mind. If this committee recommends further steps for us to consider, we will consider them. I am being clear and open that we recognise the concerns that have been expressed and that we want to respond to them, to avoid any unintended consequences of the bill in areas where we would not want that.

Duncan McNeil: I have a couple of specific points to make and I will be brief, as there are other issues to discuss. One of the big focuses in social and elderly care is the 10-minute visit, which was highlighted by a horrible "Panorama" programme some time ago that covered e-procurement and reverse auctions. We have lots of guidance but, at the heart of care, there is still a very short visit, building on a 10-minute slot.

How will the bill address such issues and the continuity issues? We accept that continuity of care is important in the acute setting and for nurses, but it is seen as less important for care in the community or care in residential settings. Are we expecting too much in wanting the bill to achieve some of that? How can we use the bill to address such issues and to improve the outcomes for people, as the Scottish Government wants to?

Nicola Sturgeon: I absolutely recognise the concern that you raise, and I share much of it. We must be careful not to expect the bill to deal with such issues, particularly as we are going to exempt a lot of the contracts concerned from the bill's provisions.

That is why I talked about the wider context. There are issues that must be addressed through other routes—I am more than happy to write to the committee in more detail about how we do that. We would be making a mistake if we regarded the bill as the sole or even the main means of dealing with all those issues. The concern that we are trying to address is that by making health and social care contracts subject to the bill's advertising and competition provisions we might make some things worse rather than better.

10:15

The Convener: It would be helpful if you wrote to us about that.

Nicola Sturgeon: I am happy to do so.

The Convener: As you said, it is not just the bill's provisions that are the issue; personalised payments for individuals who need care are at stake.

When we took evidence from the third sector in Glasgow, we found that third sector and voluntary organisations are often treated very differently from private companies in the procurement process. For example, such organisations have been asked to return any profits to the procurer. Surely that is not acceptable in a procurement process.

Nicola Sturgeon: Within the European procurement rules, the bill tries to ensure—for example, through the sustainable procurement duty—that thought is given to how third sector organisations and small enterprises can be involved in procurement exercises. For example, provisions to do with pre-qualification questionnaires and the information that can be provided are intended to ensure that disproportionate or unreasonable barriers are not put in the way of smaller enterprises.

In large part, the bill gives ministers enabling powers to produce regulations and guidance about some of those issues, but the import and thrust of the bill are about ensuring that, as procuring authorities go about their business, they do not inadvertently or advertently put unnecessary or disproportionate barriers in the way of smaller or third sector enterprises.

Paul McNulty (Scottish Government): Part of the problem is that the detailed guidance that we have published, which includes a presumption that procurers should never use a process such as a

reverse auction for personal social care contracts, is not always followed. That is one of the things that the bill addresses, so that public bodies observe policy guidelines that the Government produces on important issues.

Nicola Sturgeon: The bill will provide a statutory basis for the issuing of guidance and, as Paul McNulty said, that means that it will be mandatory and not optional for public authorities to follow guidance. That will apply not just to social care contracts but to other aspects of the behaviour of organisations that bid for public sector contracts. I am sure that we will discuss some of the issues in that regard.

Mark Griffin: The committee has heard that some provisions in the bill could have been introduced without legislation. Why did the Government choose to introduce a bill?

Nicola Sturgeon: We probably just hit on one of the reasons. We have produced guidance, but whether it is always followed is an issue. The bill will give statutory underpinning to guidance that the Government issues, so public authorities will have to have regard to it.

I know from feedback that I get that there has been a sense that quite high-value public contracts that are not so high value as to make the EU thresholds kick in are completely unregulated, so the bill fills that legislative gap.

The bill is largely about standardising and embedding good practice. There are pockets of very good practice, but good practice is not uniform across the public sector and the bill addresses that. Public contracts Scotland is the portal for advertising contracts, and we see the benefit of more and more contracts being advertised through it but, without the bill, we cannot mandate that all contracts that fall within the thresholds should be advertised in that way.

There is a variety of reasons why it is right to give legislative underpinning to some of the work that we have been doing with good effect, which will give things an extra push forward.

Mark Griffin: What are your plans for issuing guidance? Will the committee get to see any earlier drafts of it before the conclusion of stage 1?

Nicola Sturgeon: I am not sure whether we will be able to do it before the conclusion of stage 1, but I am happy to share drafts of the guidance with the committee at the appropriate time, as the committee's input would be useful. We will consult stakeholders extensively in preparing the guidance.

The committee is familiar with the bill and knows that it contains a lot of enabling powers that will be required to be used through regulations and

guidance. I am happy to undertake that we will involve the committee fully in that process.

Mark Griffin: Thanks for that. What is the anticipated impact of the new EU directive on the Procurement Reform (Scotland) Bill? Are there any areas of the bill that may have to be amended in the light of new EU regulations?

Nicola Sturgeon: That may be the case.

I should make it clear that the bill does not transpose the new EU directive into our law, nor does it seek to replace the Public Contracts (Scotland) Regulations 2012, which transposed the current directive. The bill adds to the European regulations by regulating contracts whose value is below the threshold that has been set by the European Union.

It is possible that we will require to make changes to the bill not just because the directive is not yet finalised but because it will give a lot of policy choices to member states and we might not know the implications for our own law until we have completed our consultation processes. One reason why the bill includes enabling powers is to allow the flexibility to make any changes that might be required.

There is still a degree of uncertainty in the discussions around the directive but, on the basis of the discussions thus far, we are fairly confident that the bill, as currently drafted, is consistent with EU law and sufficiently flexible to ensure that it remains consistent as the final shape of the new EU directive becomes clear.

Mark Griffin: Some witnesses have suggested that the bill could be used to strengthen freedom of information legislation, particularly through the inclusion of provisions covering contractors who win public contracts. What is the Government's view on that?

Nicola Sturgeon: The bill does a certain amount to promote transparency around the whole procurement process.

I am responsible for FOI legislation and have just been at another committee to talk about an FOI order. The FOI legislation contains the mechanism to extend coverage of the FOI regime, and it is appropriate that we use it to make any necessary extensions instead of trying to use the Procurement Reform (Scotland) Bill or any other bill to do that.

We have just seen the first order to extend coverage of FOI legislation go through Parliament, and it will come into force in April. If there is a case for further extension of the regime to companies that contract with public authorities, the way to provide for that is through the provisions of the FOI legislation. It would be inappropriate and clumsy to try to do it through the Procurement

Reform (Scotland) Bill when a mechanism for it exists elsewhere.

The Convener: When the bill team was before us, I brought up the issue of whether section 29 should use the wording in the existing FOI legislation rather than different wording.

Nicola Sturgeon: That is a slightly different issue. I hope that I am not putting words in the Scottish Information Commissioner's mouth, but I have seen the letter that the commissioner wrote to the committee and she is not objecting to sections 28 and 29. She is simply saying that some of the drafting of those sections could be closer in line with the relevant provisions in the FOI legislation.

Those sections have been drafted to be consistent with European law, but we are happy to discuss the commissioner's concerns with her. If there are any amendments that we can make at the next stage of the bill to address those concerns, we will be happy to consider them. The issue, however, is slightly different from the one Mark Griffin raised about whether we can use the bill to extend the coverage of FOI.

The Convener: A view was expressed in written evidence to the committee that, on sustainable procurement,

"Currently Scotland is significantly behind Wales and a long way behind best practice EU countries, particularly Sweden, because it has lacked the political priority to get policy details right."

How does the Government respond to that? Is the cabinet secretary content that the bill is in tune with the type of innovation on sustainable procurement that is happening in other countries such as Wales and elsewhere in Europe? The previous chief scientist, Anne Glover, said that innovation should be at the heart of a procurement bill.

Nicola Sturgeon: I will make a couple of contextual points and then address the question directly.

First, sustainable procurement is a priority for the Government. We—my predecessor Alex Neil and I, since I took on the responsibility—have rightly spent a great deal of time not just on developing the bill and getting the policy detail right but on developing the wider procurement reform agenda. Whatever people think about whether we gave the issue enough priority in years gone by, I am convinced and confident that we are giving it a lot of priority now.

Secondly, we will always seek to learn from other countries, and I am not convinced that the observation that we are behind other countries on sustainable procurement is correct. I will say a bit more about that in a moment.

Thirdly, innovation is at the heart of the bill. Section 9 places a sustainable procurement duty on contracting authorities before they carry out a regulated procurement to consider certain things in the conduct of the procurement process. Those things include the way in which they improve the economic, social and environmental wellbeing of their area; how they facilitate the involvement of small businesses, including third sector support businesses; and—expressly—how they promote innovation.

That is right, because one aspect that I have heard about since I have been in this job with regard to what needs to be improved is innovation and how we embed a more dynamic approach to innovation in the procurement process, which the bill helps us to do.

To come back to the convener's point about where Scotland sits in what I would describe as international league tables for getting it right on procurement, I am not saying that there is no room for improvement—that is why we are considering the bill. I am not saying that we should not continue to look at best practice elsewhere and try to learn from it; I take the view across a range of areas that we should never rest on our laurels.

However, if we look at other parts of the UK just now, there is a lot that should make us think that we have, in certain respects, been leading the way. Earlier this year the Welsh Government awarded the contract for its advertising portal to the same Scottish company—based in Aberdeen, in fact—that has been providing Scotland's portal since 2008, so we are ahead in that respect.

John McClelland produced his report on procurement in Scotland in 2006, and the Welsh Government asked him to do a report on procurement for Wales in 2012. The European Commission has published a number of studies on procurement in the EU, which show that Scotland is in many respects in the vanguard of developing good practice.

We are doing a lot that we should be quite proud of, but I am not saying that all is rosy and that we should not be trying to improve on our own terms or trying to learn from best practice elsewhere—and we have a commitment to do that.

The Convener: I wonder whether there is an inherent contradiction in the way in which tenders are drawn up vis-à-vis innovation. If they are too specific, we might be hindering innovation. That applies to the third sector as well as what we think of as traditional contracts, such as building the Forth replacement crossing.

Third sector organisations will say that they have innovative ways of delivering social care, for example, but often the contracting authority is very

specific about the type of care that it wants. How do we balance those aspects to ensure that we avoid a situation in which unsuccessful bidders challenge the awarding of contracts? In short, how do you think this will pan out?

10:30

Nicola Sturgeon: When I took over responsibility for procurement, I learned early on that all sorts of tensions run through this agenda, which is why getting the bill right will involve balancing a range of not so much competing interests as competing objectives. That kind of balance is a given in this whole agenda.

We need to build innovation much more into the procurement process, and the bill helps to do that in two important ways. The first is the sustainable procurement duty that I have already referred to: placing a duty on contracting authorities to consider how they will promote innovation before they carry out a procurement exercise is an important step forward that should not be underestimated.

The second important change in the bill relates to the requirement on certain procuring authorities to develop procurement strategies, which again puts an obligation on those authorities to consider how they will carry out and go about procurement processes and, crucially, how they will engage with organisations and stakeholders with an interest in the procurement. Again, that is about building in a proactive obligation to think about innovation.

Obviously, rules will kick in once the procurement is under way, but the issue is how we think about procurement in a much more dynamic and less static sense. You are absolutely right that the contracting authority might have one idea of what it wants while bidders might have their own ideas about how that can be delivered better, and we need to find ways of ensuring that such dynamism does not get lost in what can become a quite static process. That is what the bill is trying to do.

Mary Fee (West Scotland) (Lab): On the same theme, the third sector and small to medium-sized enterprises form a very important part of the procurement process. Are you confident that the package of measures in the bill is enough to encourage their involvement and make it easier for them to get involved in the procurement process?

Nicola Sturgeon: Yes, I think that there is a lot in the bill that will do that.

A frequent comment that you will hear me make about this bill is that it is not the be-all and end-all of our approach to procurement reform. If we think that we are going to solve all the issues in

procurement through legislation alone, we are simply kidding ourselves on. That said, what is in the bill is really important.

I am thinking, for example, of the provisions promoting transparency through the introduction of contract registers, contract notices and published strategies, all of which are designed to enable businesses to plan and find contract opportunities a lot more easily than they can at present. There are also the provisions to standardise aspects of the pre-qualification questionnaire process and prevent the kind of selection procedures that small businesses often draw attention to, which set unreasonable entry requirements for procurement exercises. The bill will help to deal with some of those matters.

The bill's focus on community benefits will also help third sector bodies, even if, on certain occasions, they might be involved as a subcontractor or as part of a consortium. Moreover, the sustainable procurement duty in section 9, which I have already mentioned a couple of times, puts an obligation on contracting authorities to consider how they involve SMEs, third sector organisations and supported businesses in procurement exercises.

All of those important measures will have an impact on and make a difference to small businesses' ability to access procurement spend, which is, after all, very important to them and the whole economy. Indeed, just getting more contracts on to the public contracts Scotland website will be important in ensuring that businesses are aware of the available opportunities.

Mary Fee: Supported businesses have told us in evidence that one of the biggest barriers to their involvement in the procurement process is that often they cannot compete on cost. Are you confident that the bill contains enough to make it easier for supported businesses in particular to compete?

Nicola Sturgeon: Supported businesses are obviously in a slightly different position to other businesses. I think that I am right in saying that the new EU directive might change the situation even further by widening the definition of supported business.

I go back to comments that I made earlier about the value-for-money triangle. We live in an environment in which cost is important—of course it is—but, in public contracting, it should never be the only factor. We must consider quality and sustainability. Often, small and medium-sized businesses will be in a good position on those other aspects of value for money.

If the bill is about anything in relation to SMEs, it is about trying to level the playing field and make

the contracting environment much more open for them than it is at the moment. Obviously, that all takes place within the duty of non-discrimination, which is an important obligation under European and domestic law.

Mary Fee: The Equality and Human Rights Commission has said that, in its experience, public sector procurement teams are cautious in their approach to introducing contractual clauses or social targets for equality because of concerns about breaching European law. How could that be avoided under the bill?

Nicola Sturgeon: Some work is being done on that. In partnership with the Equality and Human Rights Commission, we recently produced some guidance that is designed to assist public bodies in fulfilling their obligations in respect of the Equality Act 2010. I do not know whether the committee has had sight of that guidance, but I am happy to make it available. It is designed to help with the concerns that have been expressed.

That work continues. We are talking to the Equality and Human Rights Commission about how we best address the matter so that public bodies act consistently with their obligations under procurement legislation and under equality legislation. I am happy to make that guidance available to the committee and, if you have any specific questions on it, we can come back to you on them.

Mary Fee: Are there any intentions to break down further the definition of small and medium-sized enterprises to allow assistance for microbusinesses? Their needs are different from those of SMEs, and microbusinesses often provide the greatest community benefit.

Nicola Sturgeon: The definition of SME in the bill is a business with fewer than 250 employees, which, I think, is the standard definition. It is open to members to suggest amendments that would break that down further, but that is the definition that is in the bill at the moment.

Regardless of what the definition in the bill is, it is important that we try to gather data that breaks down further to the level of microbusinesses. We have some data through public contracts that were advertised on public contracts Scotland. In the past calendar year, 82 per cent of the businesses that won contracts were registered as SMEs. We also know from the procurement information hub that, in 2011-12, at least 6 per cent of public procurement spending was with microbusinesses directly.

We have some information about the breakdown of spend, and it is important that we continue to gather that information and try to improve on it. That is slightly different from

changing, or breaking down further, the definition that is in the bill, but it is nevertheless important.

Mary Fee: What effect will the bill have on framework agreements?

Nicola Sturgeon: The bill applies at the point when the framework agreement is established, just as it would apply to any contract at that point. It does not apply to the point at which orders are placed under the framework agreement. That approach mirrors the EU procurement directive—those rules do not apply to orders under frameworks that are awarded under European procurement rules. The bill applies at the point at which the framework is agreed, but not to the call-off contracts under it.

Mary Fee: Under the bill, there is guidance on blacklisting. Are you content that that is sufficient to address the concerns that have been raised on that practice?

Nicola Sturgeon: The bill allows us to go a significant way on blacklisting. I know that this opinion will be shared across the committee, but I should say that we have nothing but contempt and disdain for that practice. The Government is opposed to it in any form.

Through the bill, we are taking enabling powers that will allow us to make regulations regarding how a company's suitability to bid is assessed. That is in addition to the guidance that the First Minister launched a couple of weeks ago. We have also said that we are committed to on-going dialogue with the trade unions about that guidance to make sure that we are tackling the issue effectively.

The regulations will give further detail on the reasons why a public authority either would be required to or may exclude a company from bidding. That will allow us to deal directly with the issue of blacklisting.

Jim Eadie (Edinburgh Southern) (SNP): I have a short supplementary question on blacklisting. We heard evidence from the trade unions last week. There was a strong suggestion from Unite that the guidance and the on-going dialogue with the trade unions, welcome though they are, go only part of the way to addressing blacklisting and that it would have preferred the matter to be put on a statutory footing. Are you saying that the regulations will fulfil that requirement?

Nicola Sturgeon: The regulations are statute in that they are secondary legislation that is given anchorage in primary legislation through the bill, so I think that the issue of statutory force is dealt with.

Jim Eadie: You are saying that you have gone as far as it is possible to go.

Nicola Sturgeon: That is my view in terms of the bill. However, we are only at stage 1 and I will listen to any expressions to the contrary that might arise as we go through the process.

The on-going dialogue with the trade unions is important. We want to continue to talk to them to make it absolutely clear that anything that we can do to banish blacklisting will be done. The bill and the regulations that can be made under it will make it possible to exclude a company from public contracts when there is evidence that it has been engaged in blacklisting and has not taken appropriate remedial action to put its house in order.

Do you want to add anything, Paul?

Paul McNulty: No, that covers everything.

Mark Griffin: Cabinet secretary, will you outline the Government's plans for guidance on workforce-related issues, specifically on the inappropriate use of zero-hours contracts and the living wage?

Nicola Sturgeon: The bill talks about guidance being issued on workforce-related issues, and the Government supports the living wage. We pay all our own employees the living wage and encourage others to do the same. I recently announced that we are funding the Poverty Alliance to look at a project to promote the living wage in the private sector. We are absolutely committed to the living wage.

My predecessor Alex Neil examined the issue carefully in the context of procurement legislation, and we wrote to the European Commission about it. It has been made clear to us that making payment of the living wage a mandatory requirement for people who bid for public contracts would be in breach of EU obligations. We have arrived at that position reluctantly and regrettably; nevertheless, the European legal position is pretty clear cut.

Although we cannot make payment of the living wage a mandatory requirement, it is important that we use the bill to the best of our ability to encourage good practice among employers. We have looked at how we can enable workforce-related issues to be taken into account in the procurement process, and in the bill we have settled on giving the Government the power to issue statutory guidance on workforce matters in procurement, including remuneration.

We cannot make the living wage a requirement of contracts but, through the bill, we can encourage good practice. I have been talking about the living wage, but that guidance would equally encourage companies not to use zero-hours contracts inappropriately in a way that would impact on their ability to provide a quality service.

The Convener: Mr McNeil, do you want to come in at this point?

Duncan McNeil: Another area of concern, which has been raised with the Health and Sport Committee, is outcomes for people in receipt of social care in residential settings. Do you accept that the procurement process has, intentionally or otherwise, driven down the wages and conditions in that sector?

10:45

Nicola Sturgeon: I am not sure that I totally accept that. I think that there is a debate to be had about terms and conditions in the sector as a whole and the impact on quality. I am not shying away from that at all and I am not saying that you are trying to oversimplify it, but I think that it just might be an oversimplification to lay all that at the door of the procurement process.

The bill is trying to make it very clear that staff terms and conditions in any company bidding for a public contract, where that is relevant to the delivery of the contract, absolutely should be taken into account. The guidance that we will be able to issue under the bill will require purchasers to consider, where it is relevant to the performance of the contract—I think that in the kind of contracts that you are talking about it would be very relevant—whether there is evidence of, for example, the inappropriate use of zero-hours contracts or poor levels of staff pay that might affect the bidder's ability to provide the required quality of service.

I think that the bill will take us a substantial step forward in making it absolutely explicit that such issues, where they are of relevance—as I said, for the kind of contracts that you are talking about it is hard to argue that they are not of relevance—are material factors that should be taken into account.

Duncan McNeil: It would be interesting to know what work Mr McNulty has done on the issue. Have you looked at it in detail? Do the facts and figures not reflect my and others' perception that local authorities use outsourcing to avoid liability for paying the living wage because people who work in the care sector are on the minimum wage, which means that there are great savings there? If we do not accept that the procurement process has not driven down wages and conditions—we have heard in evidence that it has—what sort of work has been done that indicates otherwise?

Paul McNulty: I should say at the outset that the Scottish Government does not typically contract social care. Such contracts are principally placed by local government and the national health service.

We have not conducted specific studies of what is happening in the social care sector, but we have worked with stakeholders, including the Scottish Government's joint improvement team and representatives of the sector, to develop very comprehensive guidance on the commissioning of social care contracts. The guidance makes it absolutely clear that the focus should be on quality. Clearly, we cannot ignore cost completely for any form of public contracting, but the guidance is absolutely crystal clear that there should always be engagement with service users in planning the procurement and a very strong emphasis on quality. In my view, nothing that the Scottish Government has done on procurement would encourage public bodies to pursue cost at the expense of quality in the sector.

Duncan McNeil: When I asked the cabinet secretary whether she accepted the premise that the procurement process had driven down wages and conditions, she said no, she did not accept that, and you were nodding your head vigorously. Where is the proof that that premise is wrong? If the cabinet secretary says, "No, that's not correct, Mr McNeil," then surely to goodness we need to establish that clearly.

Nicola Sturgeon: For the record—

The Convener: Mr McNeil, I think that we are getting away from the bill. I think that you are trying to put into the bill things that are not in it. What you are talking about is, as Mr McNulty said, local authority and health board procurement.

Nicola Sturgeon: With respect, Mr McNeil, you are trying to put words into my mouth. I said that there was a more complicated discussion to be had around your premise and that I would not get into an argument with you about it. I said that there was a danger of oversimplifying the situation in terms of the procurement process. However, I have consistently accepted and sought to respond to the concerns that you have raised. The point that we have made consistently, and which Paul McNulty rightly made, applies not only to social care contracts but to the bill's approach to contracts more generally. The point is that although the Government does not procure the contracts, we have made clear through guidance our expectation of the standards that will apply.

To go back to Mark Griffin's question, what has led us to legislation on not just social care contracts but a range of contracts is our concern that guidance has not always been followed. That is why we are trying to give statutory underpinning to guidance for the future.

Duncan McNeil: Can I have one last question, convener?

The Convener: No. Mark Griffin is next.

Mark Griffin: Most committee members share the Government's frustration that the living wage is not included in the bill. A number of witnesses have questioned the Government's approach to the EU in relation to the living wage. Instead of writing to the EU to ask whether you could include it in the bill, if you had written to the EU to ask how to include it, a different answer might have been given. Are you confident that you have exhausted every possible avenue and measure with the EU to try to include the living wage in the bill?

Nicola Sturgeon: I am confident of the position that I have outlined. I assume that the committee has already had sight of the letter from the relevant European commissioner that sets out the position. The European law at issue is not the procurement directive but the posted workers directive. I am happy to make the letter available again so that the committee can see the commission's reasoning.

I do not think that it is a fair characterisation to say that we have sat back and said, "The European Union says no, so we're not going to try and do anything." The provision that we have put in the bill is us trying to find ways of ensuring that, where they are relevant to the performance of a contract, issues such as how much a company pays its staff or whether it inappropriately uses zero-hours contracts are things that can be taken into account by a contracting authority.

While I accept that there are people who would like to see us go further in this bill—I am explaining why we cannot do that—let us not, in that debate, lose sight of the fact that the bill takes us quite a significant step forward. The guidance will allow public authorities—as I keep saying, where it is relevant to the contract—to have regard to things such as how much companies pay their staff. That is a really important development.

The Convener: Is there any evidence that even just the recent discussions about the living wage have made more companies aware of the desire of Government and others for the living wage to be paid?

Nicola Sturgeon: I do not think that we have any systematic evidence of that, but in my experience there is not a lot of doubt that there is much greater awareness of the living wage and the reasons why it is important. That is the case in the private sector as well as in the public sector. I recently attended SSE's event at which it became a living wage employer. I think that the biggest companies in Scotland have done so. There is a lot of work to be done in the private sector, which is why we are funding the Poverty Alliance to lead that work and look at a living wage accreditation scheme. Provisions such as those in the procurement bill are part of that process of raising the awareness of the importance of the living

wage and encouraging employers to pay the living wage.

Again, I totally accept that there are organisations—including organisations that I have a huge amount of respect for and agree with on a lot of things, including the living wage—that would like to see the bill make the payment of the living wage mandatory. However, let us not lose sight of the fact that, through the guidance route that we have opted to take here, we are able to take action that I think will have an impact.

Alex Johnstone (North East Scotland) (Con): Moving on to part 1 of the bill, are you content that the bill applies to the right set of contracting authorities?

Nicola Sturgeon: I was wryly smiling at the fact that we have been at it for an hour and we are moving on to part 1 of the bill.

Yes is my short answer to that. I am sure that the committee is aware of this because members have read all the accompanying documents to the bill, but our approach has been to mirror the application of the Public Contracts (Scotland) Regulations 2012, while limiting the application to Scottish public bodies.

The 2012 regulations and their application are fairly well understood. It is long-standing. It appeared to us to be the simplest and most commonsense approach. The issue that has been raised in this area relates particularly to Scottish Water. The regulations that we have sought to mirror in the bill do not apply to utilities. The reason for that is that utilities are subject to separate European procurement legislation. It is a different EU regime than that for the public sector. That is at least partly in recognition of the fact that most utility entities are subject to commercial pressures to some extent. That is the reasoning for the list of contracting authorities that are included.

Alex Johnstone: On that specific subject, the Government—your predecessor, in particular—made great play of the fact that it was keeping Scottish Water in the public sector. Given that many of the utilities companies are in the private sector, is it not a bit unfair that despite the fact that we are talking about public procurement, one of the biggest procuring authorities in Scotland, which the Government has deliberately kept in the public sector, is exempt?

Nicola Sturgeon: I can see the argument that people are making. I am pretty sure that the debate is one that we will have at subsequent stages of the bill's consideration—I would be surprised if that were not the case.

Scottish Water is in public hands and, for as long as we have anything to do with it, it will

remain in public hands, but the issue is that, notwithstanding that, it is subject to a different EU legal regime—the regime that is in place for utilities—from the one that other public bodies are subject to.

The decision that we have taken about which contracting authorities to include has been driven not by consideration of Scottish Water, but by an effort to keep the bill consistent with the EU directive and the 2012 regulations. If we were to do otherwise and bring Scottish Water within the ambit of the contract thresholds in the bill, it would still not be subject to the regulations on higher-value contracts. Our decision was about ensuring consistency, rather than being a deliberate attempt to keep Scottish Water out of the bill's ambit. That was the reasoning behind it.

I am pretty sure that we will continue to have that debate as the bill progresses through Parliament, and we will see where Parliament ends up on the issue.

Alex Johnstone: Is there any scope for Scottish Water or any organisation that finds itself in a similar position to be brought within certain aspects of the proposed procurement procedure?

Nicola Sturgeon: I imagine that, in theory, it would be possible to do that, but I am not sure that there would be an argument for bringing Scottish Water within the ambit of some parts of the bill but not others. I will be happy to give more consideration to that suggestion, to reflect on it and to come back to you with a more considered response.

I have set out the reasons why Scottish Water has not been included in the scope of the bill. Those reasons are less to do with Scottish Water and more to do with keeping the regime that the bill will introduce consistent with the European regime. I hear the arguments on the other side. I do not necessarily agree with them, but I will continue to listen to them and we will reach a view when we get to the final stage of the bill's consideration.

Alex Johnstone: I have a question on a different subject—that of application. We heard from a representative of the Scottish Federation of Housing Associations about the cost implications that the bill could have for housing associations. What is your response to that concern?

Nicola Sturgeon: The first point to make is that housing associations—unlike Scottish Water—already fall within the scope of European procurement legislation. The larger housing associations have to deal with that regularly, so it is not the case that they will have to come from a position of not falling within the ambit of procurement legislation to one of falling within it for the first time. They will already be complying with

European rules and best practice on public procurement, and I think that that should limit the imposition of any additional cost on them as a result of the bill.

Experience shows that putting in place the right procurement skills tends to pay for itself extremely quickly, so I do not necessarily agree with the analysis that the bill will result in substantial net additional costs for housing associations. In addition, I note that the requirement to publish a procurement strategy will apply only to registered social landlords—and other organisations—that award more than £5 million-worth of contracts in any year. In other words, only the larger organisations will be caught by that aspect of the bill.

Alex Johnstone: Would it be possible to apply certain provisions of the bill to main contractors to improve the situation for subcontractors?

Nicola Sturgeon: In theory, the answer to that question would undoubtedly be yes, but whether it would be possible to do that without introducing a lot of complexity, given the very different contracts that are dealt with and the different relationships that companies have, is another question altogether.

As you will know, the bill puts an obligation on public authorities to deliver procurement strategies, which will set out how those authorities intend to ensure that payments by a contractor to a subcontractor are paid promptly and also how payments by subcontractors to other subcontractors are paid promptly, so through the provision on procurement strategies, the bill tries to take account of the fact that obligations on contractors are often as important to people further down the supply chain as obligations on the main contractor are.

That is the approach that we have taken, but this is another issue on which, as the bill progresses, I am happy to reflect further and perhaps give a more considered response at a later stage. Trying to do what you suggest would add a degree of complexity to the bill that might be counterproductive.

11:00

Alex Johnstone: We heard suggestions from witnesses about things such as project bank accounts, for example. Is that the kind of thing that you are suggesting?

Nicola Sturgeon: Absolutely. We are in the process of trialling project bank accounts, which were one of the early recommendations of the construction procurement review. I accepted that recommendation and we are getting ahead with it. Project bank accounts are absolutely the kind of

thing that a contracting authority, in producing its procurement strategy, might well look at to ensure that payments are made promptly right down the supply chain.

Alex Johnstone: We have also heard suggestions that there should be better policing and review of contracts once they are awarded. Will the bill contribute to that?

Nicola Sturgeon: With one or two exceptions, the bill does not deal expressly with the post-contract award period. Contract monitoring should happen as a matter of sound procurement practice and it does not necessarily require legislation. That said, there are elements of the bill that will help with that, such as the obligation on contracting authorities to publish contract registers that show who they are contracting with. That will help to increase transparency and will allow monitoring to happen. The development of procurement strategies will also help with that process. In other words, the bill will help with that general environment, but it does not put specific obligations on public authorities in relation to post-award contract monitoring.

Alex Johnstone: One question that I have asked just about every witness who has come before the committee is about the threshold levels in the bill. We have had various responses on that. What is your impression of how the thresholds have been received?

Nicola Sturgeon: At the risk of immediately being contradicted by lots of people, I think that they have been reasonably well received. It is the kind of issue on which we will never get unanimity—that would be virtually, if not completely, impossible—but, generally, the threshold levels have been well received. We wanted to have simple threshold levels. We took the 2012 regulations as the starting point. I should say that the European thresholds are originally expressed in nice rounded figures in euros but, when they are translated into sterling, they become less rounded and a bit more complicated.

Alex Johnstone: They are also variable, with the exchange rate.

Nicola Sturgeon: They are variable, and they are reviewed every two years. We took the 2012 regulations as the starting point and we arrived at thresholds in the bill, both for services and works contracts, that are not exactly but in the ballpark of 50 per cent of the 2012 regulation thresholds.

We will never get unanimity on such issues but in Scotland we deem contracts that are below the £50,000 threshold for goods and services to be low-value contracts, so that seemed a reasonable place to set the threshold. The works threshold of £2 million is not exactly but roughly 50 per cent of

the figure in the 2012 regulations, which I think is £4.3 million.

Alex Johnstone: A specific example that was raised with us is that, if a £50,000 contract is issued over four years, that could take it down to £12,500 a year or thereabouts. Is it the Government's intention for such small contracts to be covered by the bill?

Nicola Sturgeon: That sounds quite small. I encourage members to reflect on the fact that £50,000 is actually higher than most similar thresholds in other EU countries. I believe that at the moment the United Kingdom Government is consulting on a £10,000 threshold and, even if broken into those four yearly amounts, the £50,000 would still be above that threshold. Comparatively, the figure is not as low as it might appear.

That said, we will keep the matter under review to see what its impact is and ensure that we respond to any real-life concerns that might arise when the bill comes into force. The bill can amend the threshold through subordinate legislation and we would be able to make such amendments quite quickly if evidence emerged that such a move was required.

Alex Johnstone: Thank you.

Gordon MacDonald (Edinburgh Pentlands) (SNP): Part 2 of the bill covers general duties and other matters. Civil society organisations have identified 10 priorities that they consider would put sustainable procurement at the heart of the bill. What is your response to those priorities, which cover a range of subjects from greenhouse gas emissions to the promotion of positive social outcomes, and how might they be built into the bill and associated guidance?

Nicola Sturgeon: My first point is that sustainability is at the heart of the bill. Although it is most obvious in the sustainable procurement duty, we very much have it in mind in all its aspects.

I think that if we look carefully at the 10 priorities that civil society organisations have highlighted, we will see that the bill addresses most of them in one way or another. However, it might be helpful if we provide the committee with a note that goes through each of the 10 priorities and explains how it has been addressed—if we think that it has been addressed—in the bill. I am happy to get that done reasonably quickly for the committee.

Our minds must always be on what is possible within the overarching European legal framework and what is feasible and affordable, and we have to ensure that we are balancing cost, value and sustainability. I do not like the term “balancing act” but the bill has to strike certain balances and

reconcile certain tensions. We are trying to address the 10 priorities as much as possible; the guidance can expand on that, and I have no doubt that we will discuss some of the issues as the bill progresses. I remain open-minded to suggestions on how we might address the priorities further and better. After we have provided the note to the committee, members can come back to us on how we might reflect some of them better than we might be doing at present.

Gordon MacDonald: You said that sustainability is at the heart of the bill, but what are your views on the Faculty of Advocates' comment that section 9, which makes provision for a sustainable procurement duty, is, in essence, only “a duty to consider” and that such a provision is

“unlikely to be effective in any meaningful or enforceable sense”?

Nicola Sturgeon: I take a different view. If we place a duty on public authorities to consider such important aspects, they will have to do so under the law. For public authorities that procure over a certain value of contracts in a year, there is the added obligation to publish a procurement strategy as well as an annual report on what they have done. In that respect, the bill puts quite significant obligations on public authorities.

However, another balance that we have to strike is that of putting sustainability at the heart of procurement without putting undue burdens on public authorities, and I think that, by and large, we have got that balance right. As with any piece of legislation, what will make the difference is how the bill is implemented and adhered to in practice. Civil society organisations will be a key part of the process of scrutinising how the bill works in practice; indeed, with the help of John McClelland, I chair the public procurement reform board, which will also take a very close interest in how the bill is implemented. All of that will act as a check on public authorities and the extent to which they are fulfilling their duties under the bill.

Gordon MacDonald: One of the 10 asks from the civil society organisations relates to tax dodging, and the Ethical Consumer Research Association has suggested that the bill presents an excellent opportunity to take a lead on the issue of companies that use tax havens winning public sector contracts. Would it be possible to build into the bill a fair tax accreditation scheme that procurers could use to reject products and services in respect of which there might have been abusive tax behaviour in the supply chain?

Nicola Sturgeon: I am happy to consider that specific suggestion. I do not want to respond to it without giving it adequate and proper consideration.

Through the sections on the selection of tenderers and our power to issue regulations that look at the grounds on which a public authority might exclude a tenderer from bidding, the bill absolutely allows behaviour such as tax avoidance to be taken into account. That is certainly the intention. The bill is quite strong on that. However, you have made a specific suggestion that I want to give due consideration to, and I am happy to do that.

Gordon MacDonald: Okay.

The bill places a duty on contracting authorities to consider how they will promote and improve

“the economic, social and environmental wellbeing of the relevant area.”

What is meant by “relevant area”?

Nicola Sturgeon: That is defined in the bill. Section 36(2) states:

“a contracting authority’s area is the area by reference to which the contracting authority primarily exercises its functions, disregarding any areas outside Scotland.”

Basically, we chose the term “relevant area” in recognition of the fact that different public bodies operate differently. A local authority is primarily concerned with its own area, as is a health board, whereas NHS National Services Scotland, which procures for the whole country, is concerned with the whole country. We need a degree of flexibility in order to cater for the different geographical areas that different public bodies cover, and I think that the bill provides that. I do not immediately understand the particular concern around that, but I am happy to consider the matter further.

Gordon MacDonald: How will public sector bodies demonstrate that they have promoted or improved their relevant area?

Nicola Sturgeon: The responsibility of public authorities to produce annual reports on how they have implemented their procurement strategy will be the key way in which that happens. As I have said, I am sure that there will be a lot of additional scrutiny of public authorities as a result of the bill, not least by Government-led bodies that will want to ensure that public authorities are adhering to the legislation and that we see the impact of that in their areas. There will be many ways in which we can try to monitor the impact.

Gordon MacDonald: A number of organisations have made specific suggestions about how to strengthen the sustainable procurement duty. The Scottish Building Federation, for example, raised concerns about the cost of the procurement process and asked for guidance

“to provide an indication of what would be considered proportionate.”

How would you address those concerns?

Nicola Sturgeon: Obviously, further to the bill a whole range of guidance will be produced. Mark Griffin asked me earlier whether we will share draft guidance with the committee, and I have undertaken to do that. There will be a requirement to give further guidance to public authorities on how to comply with the bill’s provisions.

On suggestions about adding criteria to the sustainable procurement duty or strengthening that duty, I am sure that amendments will be lodged as the bill is scrutinised, and we will consider all those amendments. The key thing that we have to try to bear in mind is the need to strike the right balance between sustainability and affordability, and anything that we put in place must be legal and workable in practice for public authorities. It is also important to try to avoid undue duplication, which might add to the confusion and complexity. The Climate Change (Scotland) Act 2009, for example, already places public bodies under a number of sustainability duties, and it would not necessarily be particularly helpful to replicate those in the Procurement Reform (Scotland) Bill.

That is a short way of saying that we will consider any additions or amendments, but we must continue to try to strike all those balances.

Gordon MacDonald: Is there any conflict in balancing the sustainable procurement duty with the general duties that are contained in section 8? How can a contracting authority be encouraged to use SMEs and the third sector without being accused of discrimination?

11:15

Nicola Sturgeon: One of the general duties in section 8 is that of complying with the sustainable procurement duty. That cross-reference is already there in the bill. As I said, there are tensions running through the whole agenda that we have to try to reconcile as much as possible.

The bill increases opportunities for SME involvement; it also increases opportunities to take into account social, economic and environmental wellbeing. It puts the onus on public bodies to ensure that, when they take decisions about procurement, they do not overlook SMEs or act in a way that puts barriers up that disproportionately prevent SMEs from accessing procurement opportunities.

Taken together, the package of measures in the bill will have a positive impact on the whole procurement regime for SMEs. We have already spoken about implementation and adherence. Monitoring the impact in practice will be very important.

Gordon MacDonald: In answer to one of my earlier questions, you indicated the importance of annual reports. Could you elaborate on the areas that the strategies will cover? How do you stop the measures simply becoming a tick-box exercise?

Nicola Sturgeon: The scrutiny that will be applied by civil society organisations, as well as by Government, will prevent a tick-box-exercise approach. This should not be a tick-box exercise. We want the measures to be meaningful. Section 11 goes through some of the things that a contracting authority would have to take into account in its procurement strategy. For example, it will cover how an authority will ensure that its procurements will

“(i) contribute to the carrying out of its functions ...

(ii) deliver value for money”

and comply

“with its duties under section 8”.

The strategy will also include a statement about the authority’s general approach to community benefits and to

“consulting and engaging with those affected by its procurements”.

We have already touched on how the bill ensures prompt payment right down the supply chain.

Those are not necessarily exhaustive provisions—we will cover other areas in the guidance—but those are some of the things that must be taken into account.

Annual reports are important, and they will be increasingly so in allowing us to monitor the impact of procurement strategies on the relevant area of the bodies concerned, and on the businesses within those areas. Section 14 sets out some of the things have to be reported on. The reports will provide a lot of the detail that will allow the public procurement reform board, which I chair, to scrutinise and monitor the impacts in practice.

Gordon MacDonald: A number of organisations have suggested that the annual report could be strengthened, and that it would help SMEs and other organisations to have a timetable of associated activities and deadlines, as well as indications of the potential spend in the coming year, so that they can build their business plans around potential procurement.

Nicola Sturgeon: We could cover those issues in guidance. That could be a sensible approach. However, we should be careful that we do not tie public authorities into predicting things too far in advance, although good forward planning is always to be encouraged. At first hearing, we might be well advised to consider including those

issues—the suggestion is one of the things that I will consider further.

Mark Griffin: Just before we finish on part 2, I have a quick question about section 10, which is on supported businesses. The Scottish Trades Union Congress submitted evidence in support of the bill requiring every public authority to have at least one contract with a supported business. To be fair, we got conflicting evidence as to whether there was capacity in the sector to cover that. What are your views on strengthening section 10?

Nicola Sturgeon: I am hugely supportive of attempts to give as much support as we can to supported businesses—I am using the word “support” too often. The specific proposal that you mention was consulted on, and it was not supported in the consultation, which is why it does not appear in the bill. However, I am open-minded about amendments to section 10 that would allow us to strengthen further the position of supported businesses. Through the framework contract, we have tried to raise awareness of the importance of supported businesses, and we are doing what we can in the procurement process to support them. If there are specific suggestions, I am happy to consider them.

The Convener: Duncan McNeil was trying to catch my eye. Has your point been covered, Duncan?

Duncan McNeil: It was on sustainability. We have heard people in the third and independent sectors talk about driving costs down, the race to the bottom and the one-size-fits-all approach—those are their words, not mine—which they say is not sustainable.

Do you believe that the 2010 guidance on procurement for care and support services can be revised and honed to take such concerns into account? Would giving that guidance greater legislative force address the third and independent sectors’ concerns about the delivery of care?

Nicola Sturgeon: We will always look at how we address those concerns. You described the race to the bottom as being unsustainable. I would go further and say that it is not acceptable. I put that point on the record strongly.

The guidance, which we have referred to a few times, is good, strong and robust. Our bigger concern is not so much that the guidance is defective but that it is not being adhered to consistently enough. We are always open-minded about revising guidance if there is evidence that it is deficient and needs to be strengthened.

Duncan McNeil: Do you think that the guidance brings about a process that evaluates risks and benefits and focuses on improved outcomes for

people in receipt of care, which is what you want to achieve?

Nicola Sturgeon: I was involved in that guidance when I was health secretary—it lies on the health side of the Government. The guidance is strong in terms of the standards that it expects and what it considers to be unacceptable. I could be persuaded to the contrary, because I do not have a fixed view, but my feeling is that the issue is not the guidance itself but making sure that the guidance is being adhered to consistently by public authorities that are in the business of procuring social care contracts. I think we are in agreement about what is acceptable and what is not acceptable. The question is how we make sure that the standards are applied, enforced and adhered to.

Duncan McNeil: Are you confident that the bill does that?

Nicola Sturgeon: I think that we are talking at cross-purposes about what the bill does. I am being cautious about what I say. I do not make false claims for the bill; equally, I do not want to sound as if I do not acknowledge your concerns. I just think that it is important that we do not talk at cross-purposes in the wider debate on how we deal with the practices that you are talking about.

The Convener: Okay. We will move on to specific duties.

Jim Eadie: The bill places a number of duties on contracting authorities, one of which is that community benefit requirements should apply to all contracts above £4 million. We heard in evidence to the committee from the STUC that the requirement could be strengthened to make it more binding and that it should be a “must”, rather than a “should.” Have you considered reducing the wriggle room that would be available to contracting authorities?

Nicola Sturgeon: I am happy to consider that. We are placing duties around community benefits on contracts over £4 million because the evidence is that we can have most impact in terms of community benefits in bigger contracts.

I am being slightly hesitant here, because I want to look at the wording in the bill. The bill states:

“The contracting authority must, before carrying out the procurement, consider whether to impose community benefit requirements as part of the procurement.”

So, there is mandatory language there. It also states:

“The contracting authority must, in the contract notice relating to the procurement, include—

(a) a summary of the community benefit requirements it intends to include in the contract, or

(b) where it does not intend to include any such requirements, a statement of its reasons for not including any requirements.”

Perhaps I am missing something, but I am not entirely clear what bit you are suggesting we should change from “should” to “must”. I am happy to consider the issue, however.

The Convener: Mr McNulty, do you want to come in on that?

Paul McNulty: I think that the STUC was suggesting that we might impose specific requirements across all types of contracts. Part of the problem with that is that there is no one-size-fits-all solution, even for very similar contracts. There might be different community priorities in different areas or there might be different needs that the authority wants to meet. We would not support imposing particular requirements.

Jim Eadie: Okay. I was just relaying the view that was expressed by the STUC. The cabinet secretary said that she will consider that, which is fine.

Let us move on to the £4 million threshold. It would be helpful to understand the Government's rationale and evidence base for arriving at that figure. The cabinet secretary said earlier that there is always a balance to be struck. How was the figure of £4 million arrived at? Why was it not £1 million or £6 million?

Nicola Sturgeon: The figure mirrors—although it is rounded to make it neater—the figure in the 2012 regulations for works contracts, which, translated from euros into sterling, is set at £4.3 million. That is the simple answer to the question why we arrived at the £4 million figure, although there may be a debate to be had about whether the threshold should be £3 million or £5 million as opposed to £4 million. The reason why the figure is in that ball park goes back to what I said about the larger contracts lending themselves better to meaningful, impactful community benefit clauses.

We must take great care in making it clear that the bill is not saying that there should not be community benefit clauses in contracts of less than £4 million; it is simply mandating for contracts at or above that level. We should encourage appropriate community benefit clauses in all public contracts where those are proportionate and appropriate.

If I was asked what we need to be mindful of around the community benefit provisions in the bill, I would say that we need to be mindful that we do not send a message that community benefit is of no relevance for a contract of less than £4 million and should not even be considered.

Jim Eadie: Could community benefit requirements be determined on the basis of the nature of the contract rather than its value?

Nicola Sturgeon: We could do that, but we might end up having fewer contracts covered than would be covered by putting a financial threshold in place. There are arguments for and against all the approaches that we could take to mandating a particular approach to community benefits. We have opted for a particular financial threshold and I have given you the reasons for that. However, I stress that that does not mean that contracts whose value is below that threshold should never have community benefit clauses in them.

There are different ways that we could go with the nature of the contract. Some witnesses have suggested that the threshold could be set in such a way as to apply to contracts that are a certain proportion of the public authority's overall budget, but I am not convinced that that would be a sensible approach to take. Different approaches could be taken. We have adopted one that we think, on balance, is the best one to take, but I would be happy to consider alternatives as the bill proceeds.

Jim Eadie: You mentioned the Climate Change (Scotland) Act 2009. The bill provides ministers with the power to make regulations to ensure that a certain proportion of the goods that are procured by contracting authorities are remanufactured or reused goods. When does the Government expect to bring forward those regulations to provide the clarity that people require?

Nicola Sturgeon: I am not going to be definitive about that at the moment, as we need to do quite a lot of work and I would welcome the committee's on-going input into that work. It is important that we make it clear that the powers that we propose in section 31 would be reserved for situations in which, or products for which, there is a clear, stable market and a signal is required to stimulate investor confidence. We are currently examining products that are purchased right across the public sector to identify where it might be possible to pursue more sustainable alternatives, including products that have a high recycled content, for example. We are also commissioning a series of market intelligence projects to examine the market readiness or availability of remanufactured or refurbished products. We are doing all that work just now.

Although the power in section 31 is a really important power to have in the bill we need to ensure that we use it properly and that we do all the lead-up work in close discussion and liaison with industry and the public sector. We will continue to do a lot of work on that, and I will be happy to hear the committee's views and involve the committee in that work as we progress.

The Convener: Before we move on to part 4, a short comfort break is in order. We will take four minutes.

11:29

Meeting suspended.

11:33

On resuming—

The Convener: We resume our questioning of the cabinet secretary and move on to part 4 of the bill, on remedies.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): Part 4 of the bill provides remedies for suppliers similar to those in place for procurement above the EU threshold. There was disagreement in the evidence as to how necessary those provisions are. For example, health boards stated that the hassles and costs of going to court could put off SMEs and that an ombudsman approach would be preferable. How do you respond to that critique, and what consideration has been given to the idea of a procurement ombudsman?

Nicola Sturgeon: I shall come on to the ombudsman point in a second, because we have been giving some consideration to that.

On the point about remedies and whether they would put off SMEs, I am not sure that I entirely agree with that analysis. No organisation is compelled to pursue remedies through the courts, but it is important to have that option available for companies, and the remedies in the bill are available to all bidders regardless of size.

The bill tries to strike a balance, making the rules effective but not creating unnecessary risk. The package of remedies in the bill is lighter touch than the remedies available through the courts under the 2012 regulations. For example, it does not provide for a standstill period between the decision to award a contract and its conclusion, it does not provide for automatic suspension of the decision to award if somebody challenges that decision, and it does not provide for the court to be able to declare a contract ineffective. In those circumstances, it would provide for the court to make damages payable only if there was something flawed about the contract award.

There are also important safeguards for public authorities as purchasers in the procurement process with regard to the need for complaints to be brought fairly promptly, normally within 30 days of the complainant becoming aware that there might be a problem. The bill also makes it clear that complaints can be brought only by somebody who wished to be awarded the contract and only

after they have made the grounds for the complaint known to the authorities.

I hope that that approach strikes the right balance. There will always be issues raised either by the purchaser or by the supplier side about the appropriateness of that balance, but I think that we have got it right.

I know that a lot of opinion has been expressed in favour of an ombudsman. We have given some consideration to that and, although it is not provided for in the bill, it is not something that we have ruled out entirely. What we intend to do at this stage is consider the issue of an ombudsman in the context of the 2012 regulations, which will need to be replaced once the new EU directive is adopted in early 2014.

There are other EU member states that have established procurement tribunals as part of their implementation of directive remedies. We have given effect to that through the 2012 regulations, so when we transpose the new directive into law, that will give us another opportunity to consider the question of an ombudsman. The evidence that has been given in the context of this bill would be taken into account when we are making that decision.

Adam Ingram: So watch this space.

Nicola Sturgeon: Indeed.

The Convener: One of the threads running through all our evidence sessions has been the need for skills and training, both for procurement officers and for those tendering for contracts.

Cultural change came up in the evidence session on 4 December, and the memorandum that we have had from the Local Government and Regeneration Committee concludes that

“potential barriers mainly ... relate to culture around regulated procurement activity”.

What can be done to improve skills and training, both for those procuring goods and services and for those tendering for contracts?

Nicola Sturgeon: I agree strongly with the points that have been made about skills, training and culture change. I have said repeatedly, and will no doubt say many times again, that the bill is only part of what we need to do to improve the whole procurement regime.

Getting people to have the right mindset about procurement is important, and linked to that is ensuring that people have the right skills and capability. I have heard John McClelland say repeatedly that we must ensure that we have the right degree of professionalism across the whole procurement profession and among all the people who are procurement practitioners.

A lot is already happening on skills and training in procurement. For example, we have procurement capability assessments for organisations; there is a range of training tools in place for staff; and there is a cross-sector capability assessment tool. We are also looking at different ways to encourage young people to enter the procurement profession—through modern apprenticeships, for example—so there is a lot already happening as a result of the bill and of some of the reform work that we are doing. It is undoubtedly the case that more needs to be done.

You will have noticed that the financial memorandum sets out details about staff and non-staff resources that are intended to support training on both policy and systems changes for the wider public sector. In my view, one of the more important aspects is the need to ensure that practitioners have the training, the capability and the skills that they need if they are to implement the bill's provisions properly.

The Convener: Thank you. Adam Ingram will ask about issues that the Finance Committee raised.

Adam Ingram: Yes. Correspondence from the Finance Committee indicates that there is uncertainty about Scottish Government staff costs beyond 2016-17. Can you shed light on that, cabinet secretary?

Nicola Sturgeon: I have seen the Finance Committee's comments. This relates to what I said to the convener. There will undoubtedly be a need for additional staff resource during the implementation phase of the bill, to train people on the PCS system, for example, and to help to deliver regulations and guidance and help the public sector and businesses to adapt to the changes.

All of that is taken as read; at this stage there is more of a question mark over whether there will be an on-going need for additional staff resource beyond 2016-17. That is something that we will have to review nearer the time, and the decision will be based on our experience and the amount of work that we envisage will still need to be done.

I think that it is unlikely that by that stage we will have ticked the procurement box and said, “Job done.” There will be on-going requirements, but we need to get closer to that point before we can assess what the on-going staff resource requirements might be.

Adam Ingram: Thank you. The convener will pick up on points that another committee raised.

The Convener: In its memorandum to this committee, the Local Government and Regeneration Committee asked whether the bill will be compatible with future community planning

partnerships legislation. How does the bill relate to measures in the forthcoming community empowerment and renewal bill? There is also the question of what will happen when health boards devolve a pretty large percentage of their budgets to health and social care partnerships.

In evidence that we heard outwith formal committee meetings, we heard concerns that arm's-length executive organisations will not be covered by the legislation. How do such organisations fit into the bill?

Nicola Sturgeon: This bill is aligned with the forthcoming community empowerment and renewal bill and the approach to community planning partnerships. A key provision in the bill is on procurement strategies, and in developing such strategies public authorities will have to consider how they engage with and consult the people who will be directly affected by procurement, who will include community representatives, public service users and user groups and so on. There is a strong alignment between what the bill is trying to do on engagement on procurement and the broader agenda of community empowerment. That is a short answer to your question; I think that our approach is consistent.

The bill takes no hard-and-fast position on ALEOs. Whether an ALEO will be subject to the bill's provisions will depend on the ALEO's status. An ALEO that to all intents and purposes is a public body is likely to be covered, but an ALEO that is an institutionalised public-private partnership might not be covered. There are no hard-and-fast rules around that. I tend to think that that is the right approach, but I will be open to suggestions that come forward as the bill progresses about how we clarify the position or make it definitive.

The Convener: That is helpful.

Adam Ingram: How will recommendations from the review of Scottish public sector procurement in construction be included in the bill and its associated guidance?

Nicola Sturgeon: The bill will be helpful in our on-going work to implement the review of construction procurement. As you know, there are a lot of overlapping areas such as simplification of the PQQ process; prompt payment, which I talked about; and our work to trial project bank accounts. The bill will help us to work out how best we use its levers to drive forward the recommendations for change in the thoroughly excellent report that the review produced.

The Convener: We will now have questions from Jim Eadie.

11:45

Jim Eadie: At this point, I should declare an interest, which is that I am the constituency member for the University of Edinburgh.

Cabinet secretary, you said earlier that one of the intentions of the bill is to create a more dynamic process for innovation and that that would be done primarily through the sustainable procurement duty. However, it is fair to say that we received hard-hitting evidence from the higher education sector about what it perceives to be the bill's impact.

Advanced Procurement for Universities and Colleges said:

"The Procurement Reform Bill has the significant potential to damage the sector's activities around research excellence."

Clearly, that is not the intention. Karen Bowman of the University of Edinburgh made the point that the university has spun out somewhere in the region of 170 companies. They could be supplying the university but, under the bill, their business will be open to competition.

In responding to those concerns, do you intend to introduce regulations that will exclude procurement for research purposes?

Nicola Sturgeon: We have been talking to stakeholders about that, and I am aware of the concerns of the higher and, indeed, further education sectors about the potential for procurement law to hinder their ability to compete for research and teaching commissions and also about the definition of research that the EU applies to certain exemptions in the area.

It is our intention to exempt from the requirement to advertise under the bill contracts that are in pursuit of commercial activities that would include research and development. As with the indication that I gave in connection with health and social care contracts, I hope that that will go a considerable way to addressing the concerns that you cited.

Jim Eadie: That was the clarification that I sought. Thank you for that. I assume that there will be a continuing dialogue with the sector to ensure that its concerns are taken on board.

You mentioned the definition of research, and I will ask about that. It might be a question as much for officials as for you, cabinet secretary. Another point that the University of Edinburgh made in oral evidence is that there is a challenge in determining what is used for research, teaching, administration or a combination of them. Two practical examples were given. One was high-performance computing, which has a mixture of applications, and the other was microscopes, which can be used in laboratories for research and for teaching.

How do you intend to address that issue when it comes to defining research?

Nicola Sturgeon: I always like questions for officials, so I will pass it to an official.

Paul McNulty: There will always be a challenge when things are bought for mixed purposes, but it is a challenge that purchasers face in other areas, too. We would need to address that in guidance, which would have to focus on the predominant purpose of the equipment's acquisition. If the predominant purpose was to use it for research, it would be exempt but, if the predominant purpose was administrative, it would not be.

Jim Eadie: That is helpful. I am sure that the higher education sector will reflect on that response. What level of engagement has there been with the sector?

Paul McNulty: I have had personal discussions with Angus Warren, who is the chief executive of Advanced Procurement for Universities and Colleges, and with Karen Bowman, whom you mentioned. I plan to continue that direct engagement and have committed to discussing the draft exemptions with them both as the guidance progresses.

Jim Eadie: Do you envisage the issue being resolved through regulation rather than provisions in the bill?

Paul McNulty: That is not for policy officials to determine. We have sought advice from parliamentary counsel on the most appropriate way to do it. We await that advice.

The Convener: As no one has any further questions, I ask the cabinet secretary whether she has any final comments to make.

Nicola Sturgeon: We are exhausted. You have exhausted me, anyway.

The Convener: I thank you and your officials for answering the questions so succinctly.

We now move into private as the committee previously agreed.

11:49

Meeting continued in private until 12:12.

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