



Northern Ireland
Assembly

COMMITTEE
FOR EMPLOYMENT
AND LEARNING

OFFICIAL REPORT
(Hansard)

Recontracting Training for Success

12 October 2011

NORTHERN IRELAND ASSEMBLY

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FOR EMPLOYMENT
AND LEARNING**

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Members present for all or part of the proceedings:

Mr Basil McCrea (Chairperson)
Mr Thomas Buchanan (Deputy Chairperson)
Mr Jim Allister
Mr Sammy Douglas
Ms Michelle Gildernew
Mr Chris Lyttle
Mr Barry McElduff
Mr David McIlveen
Mrs Sandra Overend
Mr Alastair Ross

Witnesses:

Mrs Nuala Kerr)
Mr Des Lyness) Department for Employment and Learning

The Chairperson:

We are joined by Nuala Kerr, director of skills and industry, and Des Lyness, head of recontracting branch. You are very welcome, and we look forward to hearing what you have to say.

Mrs Nuala Kerr (Department for Employment and Learning):

Good morning, Chair. We are here this morning to talk to you about Training for Success and ApprenticeshipsNI, which are our two main training provisions. On one hand, Training for Success is for unemployed 16- and 17-year-olds, and, on the other hand, through ApprenticeshipsNI, we provide funding for the training of people in employment. At the moment, that covers all age provision, although there is a differentiated rate for those under 25 and those over 25. The programme has been running in that form since we last recontracted it in 2007. At that stage, the contracts were for three years with the facility to extend by one year and then another one year, and we have exhausted all that recontracting.

We began the recontracting process in January 2010 with a view to having them in place by June this year. Unfortunately, we have had two objections to the selection process. Two of the unsuccessful bidders have taken legal action, and the process of recontracting is under an injunction. So, we cannot move to the award of contract.

From our point of view, the two programmes have been extremely successful, and, through the actions we have taken to support them, we have ended up this month with the highest ever occupancy rates for both programmes, which, together, amounts to 20,000 people — in excess of 12,000 under apprenticeship programme and approximately 8,000 under Training for Success.

The Committee will have received regular updates on the occupancy rates for the apprenticeship programme. The bulge at this time is as a result of the September intake and the beginning of the academic year cycle when many of those programmes begin.

We are stuck in the process. Obviously, because of the court cases, we cannot talk in any detail about the two particular cases that are delaying the process. However, the current final year ends in March 2012, and, as we stand, we are not optimistic that we will make that deadline, as we do not expect to be able to have the hearings of the two outstanding cases in the time that will allow us to complete the process. If that situation arises, we will have to look to alternatives to tide us over until such times as the court process is completed.

I submitted a paper, which sets out where we are. Do you want us to go into a little more detail about what we are doing through the recontracting process? There were two previous reports from the Committee. Maybe you would like to hear how they have operated.

The Chairperson:

Do members want to do that, or do you want to ask questions on what has been said about the legal process?

Mr Allister:

Do we have the papers?

The Chairperson:

The paper is in tab 5 of members' packs. While we are gathering our thoughts, you can take us through the paper.

Mrs Kerr:

The paper sets out essentially what I said to you to date. It begins with the background to the two programmes — Training for Success for 16- and 17-year-olds and the ApprenticeshipsNI level 2 and ApprenticeshipsNI level 3. The Committee produced two reports. The first was in May 2008, and we made a number of changes as a result of those reports. Those changes have been incorporated in the changes that we made to the provision and the method of procurement that we pursued since that.

The procurement exercise was considered a part B services procurement process, which ostensibly lends itself to greater flexibility about how the procurement process can operate and does not require an official journal advertisement. However, we can set up contracts under that arrangement for a total of four years. It involved a two-stage process, and, at stage 1, a number of bids were deemed to be unacceptable, and two of those unsuccessful bidders have taken action.

You can see the timelines. We first published the tender in November 2010. I think that I said January 2010 earlier, but I meant January 2011. I apologise for that. The closing date was in January 2011. Bids from Oriel Training Services and First4Skills were rejected, and they have lodged separate claims with the High Court commercial division. As late as yesterday, there was a review of the documents, so no date has been set for the actual court hearing. At this stage, it is likely that the cases will not be heard before the new year.

The last section of the document talks about the way forward. We will have to continue with

the arrangements that we have in place at present, assuming that we can reach agreement with our accounting officer to have a direct award of contracts. Therefore, the changes that we had envisaged in this new round cannot be implemented until such times as the court cases have been resolved to allow us to make the changes that we had wanted to make under the programmes.

The arrangements for ApprenticeshipsNI are much as they are now. However, we have made a number of changes to Training for Success, how it will operate and the support that we will offer people with disabilities and so on under the new contract. That cannot be put in place until the matter is resolved.

The Chairperson:

Nuala, it is still not really clear to me exactly what is going on. A number of members have indicated that they want to ask questions, so we will take those now. Perhaps it will become clearer to me as we go through. Otherwise, I will try my best to explain what I do not get.

Mr Allister:

I want to clarify what is going on. The paper refers to Oriel Training Services and First4Skills taking legal action. As you came into the room, we were being directed to correspondence that refers to action by Rutledge Joblink. Is that anything to do with this?

Mrs Kerr:

No, that is unconnected.

Mr Allister:

So, we can forget about that as far as this discussion is concerned?

Mrs Kerr:

Yes.

Mr Allister:

Perhaps it was my misunderstanding. The commercial division actions include injunctive relief. Has an injunction been granted?

Mrs Kerr:

Yes.

Mr Allister:

Does it restrain you from going any further?

Mrs Kerr:

It restrains us from awarding the contract.

Mr Allister:

Will there be cost implications for the Department pursuant to the delay?

Mrs Kerr:

There will be legal costs, but I do not whether costs are likely to arise from the delay. If we proceed on the basis on which we operate at present and continue until the legal cases are resolved, I do not expect there to be any additional cost. There may be costs if some other change arises, but, at this stage, our expectation is that no significant costs are associated with that.

Mr Allister:

Maybe you do not know the answer to this, but, when an injunction is granted, an undertaking in damages is normally given by the party that gets the injunction. Has that been done in this case? If it turns out that the case is unmeritorious, those who they have enjoined should be able to recover the loss that has been inflicted on them. Is that part of this?

Mr Des Lyness (Department for Employment and Learning):

The Department tried to get the injunction lifted in June. That matter was discussed in court. We were not allowed to lift the stay at that stage, and the judge put back the matter and said that it would be dealt with at the trial stage. It was mentioned and discussed.

Mr Allister:

If the scheme that you are extending to keep you going expires in less than six months' time and the probability is that you will not have a result by then, what happens?

Mrs Kerr:

We would have to seek our accounting officer's support to consider a direct award action. That would effectively mean that we would owe direct award to the existing contract holders.

Mr Allister:

Without any competitive process?

Mrs Kerr:

Yes.

Mr Allister:

That would bring you into conflict with other procurement —

Mrs Kerr:

As far as I know, these are extenuating circumstances that would permit such action.

Mr Allister:

There is provision for a single contract arrangement if it is authorised by the accounting officer. So, that is the road that you would go down.

Mrs Kerr:

Yes.

Mr Allister:

How long would that extension be for?

Mrs Kerr:

We would have to make an assessment of how long it would take us to be able to complete it.

Mr Allister:

Are you not injuncted from doing that?

Mrs Kerr:

We are injuncted from the award of the contracts, but not —

Mr Allister:

But, the purpose of that injunction is so that no one else gets them. The injunction does not prohibit someone else, namely the present holder, from getting them by another route and having their contract extended.

Mrs Kerr:

As far as I know. That is our understanding of the situation at present.

Mr Allister:

It would rather circumvent it from the point of view of whoever brings it.

Mrs Kerr:

Those who are bringing the action are deliverers who already hold contracts in the existing profession.

Mr Allister:

Therefore, if the matter has not been progressed and concluded by March 2012, the people who are bringing the action will be beneficiaries by having their existing contracts extended?

Mrs Kerr:

They are at present because we have had to extend current contract arrangements.

Mr Allister:

It is a win-win for them.

Mrs Kerr:

The situation is that direct contracts cannot stay like that forever. It would have to be a relatively short-term action. It would require an assessment of how long that time should be.

Mr Allister:

How many other providers would benefit from single action procurement? Would it be just those two?

Mrs Kerr:

No. All current providers have had their contracts extended to March 2012.

Mr Allister:

How many?

Mrs Kerr:

Around 62, I think.

Mr Allister:

There were 62 submitted bids.

Mr Lyness:

Sorry. There are around 53 contracts at present.

Mr Allister:

Therefore, there were 53, and those two plaintiffs are among them. They would all have had their contracts extended for, what, a year?

Mrs Kerr:

We intended to award contracts on 1 June. Therefore, they have all been extended until March 2012.

Mr Allister:

Yes, but if you get to March 2012 and you have not resolved it, will you extend again?

Mrs Kerr:

We will have to extend in reasonable time.

Mr Allister:

How long will that be for?

Mrs Kerr:

At this stage, we do not know. It seems logical that you would probably have to look at six

months at least.

Mr Allister:

It is a bizarre situation whereby those plaintiffs would actually get what they want merely by bringing those proceedings and getting injunctions.

The Chairperson:

Jim, it is a legal argument, though. The Department will respond to the situation. Presumably, you cannot extend the contract any further because of legislation. You are allowed to extend it for one period only.

Mrs Kerr:

Until March 2012.

The Chairperson:

Is that under legislation?

Mrs Kerr:

No, it is under the existing terms of contract.

The Chairperson:

Therefore, the contract will have stipulated —

Mrs Kerr:

The contract would have stipulated three years, plus one year, plus one year. Obviously, it is more desirable to recontract as early as possible. Therefore, in that process, we have had to extend to the full extent that those contracts allow.

The Chairperson:

OK. That leaves you with the procedural process whereby a direct award lets you deal with your legal obligations. However, as Jim pointed out, not only are you giving to people who are plaintiffs, but you are giving to people who have failed at stage 1 of the selection process. There is a legal argument.

Mr Allister:

It is a conundrum. I can see that. However, it is bizarre.

The Chairperson:

I do not know who can help me on this. Part of the problem is that the legal process has taken so long. Do we have any recourse? Can we speak to the Attorney General or someone like that to ask whether, given the distress and difficulty that it will cause to many people who are unconnected with the issue, we have any redress without interfering in judicial impartiality?

Ms Gildernew:

I do not think that the Committee can go to the Attorney General, but the Minister has.

The Chairperson:

Maybe we will deal with it through the Minister to see whether we could ask. Jim, you would know about these things. What is your opinion?

Mr Allister:

I can tell you that commercial actions can go on for years. They are notoriously protracted. There will be a commercial judge, who will be trying to keep the matter chugging along. There will be monthly reviews. It is really up to him to ensure that the matter is brought to a head and proceedings are concluded.

The Chairperson:

I am sure that he is doing his best. We need to get a proper resolution, although I understand that you will go for direct action as a default position.

Mrs Kerr:

It is not desirable, Chair. We would wish to make changes. Many of the new bidders have advanced what they wish to do in anticipation of getting contracts. You can see that people are geared up to take on that work. It is not a desirable for the matter to remain unresolved.

Mr Allister:

There is no reason why the Committee could not write to the Lord Chief Justice to draw his attention to the situation, express our reservations about the knock-on effects and to seek an

assurance that the matter is being progressed as expeditiously as possible.

The Chairperson:

If we were to do that, we should, as a matter of course, write to the Minister as well.

Ms Gildernew:

Nuala, during your presentation, you mentioned that the problem will impact on people getting apprenticeships, and you mentioned disability. I feel that the Department could do more to support people with disabilities into apprenticeships — I could not let that point go.

I read paragraph 9 of your briefing paper a couple of times, and Jim asked whether there will be a financial implication. Paragraph 9 states:

“Thereafter, if the new contracts are not in place, the Department’s Accounting Officer will be asked to consider direct award action as an interim measure.”

I thought that meant that bringing in another contractor will have a financial implication. You said that it will not, but it is now clear that it will mean that the contracts will be extended because of the court action. We are simple people, Nuala. There is a better way of saying that. It was like pulling teeth to get that information out of you. It would help for the information from the Department to be written in a way that is a wee bit clearer so that we do not have to spend 10 minutes trying to tease out what it means. We are ordinary people; talk to us like ordinary people.

The Chairperson:

That general point has now been made. We tried to explain it to ourselves, but we did not necessarily do a great job.

Mr Allister:

Given that we are talking about the lingo, what does the last sentence of paragraph 7 mean? It states:

“Co-joined legal action taken by the Department and CPD in June this year failed to remove the interruptions.”

Mr Lyness:

As I explained, when the claims were made under the regulations, the Department was able to apply to have the injunction lifted.

Mr Allister:

Why did you not just say that?

Mr Lyness:

I was trying to keep to as few words as possible.

Mrs Kerr:

For those who are interested in this area, some other interesting technical points underpin the situation. The two claims are being heard simultaneously, and there was some discussion about whether they would be handled separately or together. That matter is setting some precedents in this area. That is why the “co-joined” reference is made. You are telling me that it was too complicated; I apologise.

The Chairperson:

It is not complicated when we finally know what it means.

Ms Gildernew:

You would think that the complication was deliberate so that we do not understand.

Mrs Kerr:

It is not meant to be.

The Chairperson:

We understand the issues that constrain you when you are part of a legal process. However, the Committee can deal with matters in closed session. Given the pivotal role of those two programmes in the Department, it is appropriate that you explain the situation to us. It should not be a case of just reporting to us or letting us know. Frankly, we should not be sitting here asking whether anybody around the table knows what we can do. The Committee should not be put in that position. If we get appropriate warning, we can take our own legal advice or arrange our own research.

As you gathered, we are not unsympathetic to the position in which the Department finds itself, but we need to find a way to encourage a speedier resolution through whatever means possible. Although our words may occasionally sound harsh, they are spoken with good intent,

and I am quite sure that you are able to look after yourselves. We want to offer help and timely intervention.

Sammy has been waiting very patiently, so I will bring him in now. Then, unless anybody else wants to speak, we will be near to a close on this session.

Mr Douglas:

I thank Nuala and Des for their presentation. I want to follow up on what the Chairperson said earlier. When we look around, we see that unemployment among young people and those leaving school — the whole NEET family — is growing in all our constituencies. That will have a huge impact on the overall economic situation and employment opportunities for people, particularly in disadvantaged communities. I will go back to what the Chairperson said: is there any way in which we can get some more information now? I was nearly going to put my next question to Jim Allister. The briefing paper refers to the challenges by Oriel Training Services and First4Skill: is there any way for the Committee to find out what those challenges are about? Is that sub judice, Jim?

The Chairperson:

No, it is OK to ask the question, but we may well have to deal with the answer in closed session. We may not be able to deal with it now. Is there something you can tell us in closed session?

Mrs Kerr:

May I take advice on that, Chairperson? My understanding is that we ought not to discuss the detail of the cases. However, if I can share some detail with you in closed session, I will be glad to do that. Please permit me to come back to you on that.

The Chairperson:

I would be content with that, Nuala.

Mr Douglas:

What are the implications for 2012? I am not talking about the legal implications, but about the growing numbers of young people who want to access NEET programmes but will not be able to because of that situation. Somewhere along the line, the story will be out in the media about the impact on local communities and young people.

Mrs Kerr:

We recognise entirely that these are very important programmes, and, for that reason, we will have to find a way to allow them to continue. I will outline the options open to us. The contracts that we have extended can run to March 2012. At that point, those contract arrangements fall, and we have no scope to extend them. However, we are examining whether the accounting officer can make some short-term provision to allow the existing contracts to run for a further short period. We hope that we can achieve that, which would allow the programmes at least to continue as they are. However, we had been making changes under the Training for Success programme to make provision better for disabled people or those who face other barriers. We will not be able to make any of those changes or any of the improvements that we would have liked to make while any of this is in place. That will not happen at this point or during the extension period.

The Chairperson:

To be fair, there is still much to be decided. At the moment, you are only asking the Department's accounting officer to consider a direct award. You could make a direct award to anyone; you do not have to assume that you would award it to the existing contract holders. I do not know what the process is; I am only saying that that is a legal position.

Mrs Kerr:

Those are the kinds of issues that we will have to consider as we get towards the end of the process. We need to understand, for example, what timescales we are facing. As we get closer to March and the judge has had a chance to look at the cases, we will be in a better position to know when our case is likely to be heard.

The Chairperson:

There is a particular point on which the Committee would like to be apprised. There will be implications were this not to happen — I do not mean the legal implications. You are suggesting changes to the current contract. What are those changes? We need those to be highlighted: for example, currently, the Department does this but wants to do that; if we cannot move forward, this is what will fall. The Committee also needs to know how many bids there are. Some 62 organisations submitted bids, but for how many contracts?

Mr Lyness:

The contracts are for both Training for Success and Apprenticeships NI, so those would be —

The Chairperson:

But in different areas?

Mrs Kerr:

Yes.

Mr Lyness:

We operate in 26 areas and award multiple contracts in each area. We are trying to ensure that we get a spread of providers —

The Chairperson:

Why do you have such a spread? Were the two companies that objected applying for all 26 areas?

Mrs Kerr:

I do not have that information —

The Chairperson:

Why can the programmes not proceed in areas that are not contested?

Mrs Kerr:

There is a blanket injunction on us; we cannot progress to the award of contract.

The Chairperson:

The Department sought to have the injunction overturned, but has the argument been made to the courts that there are areas in which contracts are not contested and could proceed?

Mr Lyness:

No. That argument was not made.

Mr Allister:

Why not? It seems so obvious.

Mr Lyness:

Perhaps not. I do not know. We operate under the advice of our colleagues in the Departmental Solicitor's Office (DSO), so —

The Chairperson:

Advice comes in the way of asking whether you can do something, and the answer comes back yes or no. The information will not be volunteered. The Department needs to be in a position to say that this is a really serious situation and that it must do anything possible to mitigate the effects.

Mr Allister:

How many of the 26 areas are affected by this challenge?

Mr Lyness:

The two organisations in question applied for all 26 areas.

Mr Allister:

I thought that you told the Chairman that they had not?

Mr Lyness:

I hope that I did not. I said that we had not considered whether we could split them up; that was not part of the debate as to —

Mr Allister:

You could not split it up if those two plaintiffs have applications for all 26 areas, because then there are no areas free from their interest. I understood that you told the Chairman that there were areas free from their interest but could not tell us why you had not sought to have the injunction lifted in respect of those areas.

Mr Lyness:

If that is what I said, I was wrong, but I do not think that I said that. All I was saying was that we

had not considered that approach —

The Chairperson:

Mr Allister's point is that there is no point in considering that approach if all 26 areas are contested.

Mrs Kerr:

I am very uncomfortable talking about the detail of these cases. I feel that, given the situation, we have taken the best legal advice, and I do not feel that we can discuss these cases in public like this. I would prefer that we did not talk about the detail.

The Chairperson:

We understand the legal constraints, but we are not dealing with any particular cases or the merits or otherwise of what happened. There is this feeling, which I absolutely reject, that the minute somebody mentions the word "injunction", you have to stick your head in the sand and not discuss anything. It is absolutely right that this Committee will examine the implications of the failure to award contracts. What we are trying to do is to find a way round it. When we ask questions, I give you leave to go off and find what you can and come back to us. However, it will not be acceptable to the people of Northern Ireland if we end up with no apprenticeships or schemes. We have to find a way to make sure that that is dealt with properly and legally, and we support you in that.

I would like you to go and consider, within the Department, how and to what level you can share information with the Committee in whatever format, whether in closed session or whatever, so that we can understand the issues that are being put forward. We do, of course, respect the legal position.

Mr Lyttle:

I apologise that I had to step out of the room to attend to an urgent matter. My question may already have been asked, and if that is the case, we can move on quickly: is the issue impacting on the current delivery or operation of the contracts?

Mrs Kerr:

No. The situation affects our ability to make changes. We had sought, under the new

arrangements, to make some changes to the content of the programmes and how they were delivered. We cannot make those improvements; we are frozen into the existing arrangements with the existing providers. We have extended those existing contracts until March 2012.

Mr Lyttle:

So the situation is preventing improvements being made.

Mrs Kerr:

Yes.

The Chairperson:

Nuala, you will have heard on the record that we will be writing to the Lord Chief Justice and the Minister asking them to examine the issue. Have a think about how you might best move forward. You consider that, and we will talk to the Committee Clerk and see what we can do.

Mr Allister:

Just before we leave —

The Chairperson:

I have not finished with the topic; I am merely letting the witnesses go.

Mr Allister:

If there is any reason why a letter to the Lord Chief Justice would elicit an embarrassing reply — namely that it is the Department that has dragged its feet on this — we should know.

Mrs Kerr:

I would be astonished at receiving such a response.

The Chairperson:

That is grand — point made. Thank you very much, folks.