



Northern Ireland
Assembly

Committee for Social Development

OFFICIAL REPORT (Hansard)

Housing Executive Maintenance Contracts

16 May 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Alex Maskey (Chairperson)
Mr Mickey Brady (Deputy Chairperson)
Ms Paula Bradley
Ms Pam Brown
Mr Gregory Campbell
Mr Michael Copeland
Mr Sammy Douglas
Mr Mark Durkan

Witnesses:

Mr Declan Allen	Northern Ireland Housing Executive
Mr Gerry Flynn	Northern Ireland Housing Executive

The Chairperson: I welcome to the Committee Gerry Flynn and Declan Allen. You are both very welcome, gentlemen. What sparked our request to have you here was the recent problems with Garrivan and O'Rourke in Newry. I know that employees have been sitting in on this. The contract came to an end abruptly. I spoke to trade union representatives who were doing a sit-in on the premises, and so on.

Being careful for the record, I am not sure whether it was the same company. Last year, I spoke directly to senior management in the Housing Executive and people in the Department about a similar situation in which companies were going into administration and employees were being transferred across under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). As I understand it, currently, some people have not had their employment situation resolved. That alarms me. It is very unfortunate.

Obviously, we have asked you to give us an update on recent events in Newry. I think that the company was based in south Down.

Mr Brady: It was based in Warrenpoint.

The Chairperson: We would appreciate very much some information on that. Wider issues are, obviously, the impact that it has on maintenance contracts for householders and also — what we consider to be an important issue — the impact that it has on the workforce of such companies. Where do workers stand?

I have to say that I was not impressed. I am saying that for the record. I was not impressed by the responses from either the Housing Executive or the Department that I got last year. I do not want to

be unfair to people. However, as I saw and read it at the time, the attitude from both organisations was, "Nothing to do with me, guv". That meant that workers, in particular, were left high and dry with nowhere to go. That is not good practice. Given the financial boost to the economy and so on, I am getting an increasing number of representations from companies that argue that they keep having to go in with lower tenders, which is unsustainable. So, alarm bells are ringing that there may be more of these problems, with companies being forced into administration because the tender prices initially are too lean. None of that might be correct, but that is the representation that we have been receiving, no later than yesterday. That having been said, Gerry and Declan, I appreciate your updating the Committee this morning. Thank you for being here.

Mr Gerry Flynn (Northern Ireland Housing Executive): I will begin by covering some of the facts around what happened with Garrivan and O'Rourke as best I can. Obviously, some of that will be commercial in confidence, but I will do my best to paint a picture of what happened, what we are doing and how we are trying to move forward. Then I will be happy to take questions, and I will do my best to answer them. If there are issues that I cannot answer here today, I will come back to the Committee with the information.

The background on Garrivan and O'Rourke is that the Housing Executive went out to competition in the summer of 2012 with about two thirds of its response maintenance works, and the company Garrivan and O'Rourke won three contracts. It won contracts in north Belfast, east Belfast and Antrim Street, Lisburn. The Belfast contracts were let on 1 August 2012, and the Lisburn contract was let the following month. The duration of those contracts was four years, and they were based on a competition. Guys got appointed to a framework, and the people with the lowest price got appointed to various modules.

Alongside the appointment of a contractor to the works, the Housing Executive, as part of that contract, introduced a new performance management regime that was based on a set of key performance indicators, which are in the main very challenging for the contractors. With those key performance indicators lies a set of penalties, which is the best way that I can describe it. If you fail to achieve the required performance, you will be faced with the potential of having low-performance damages applied. So, you have a context of a competition and a lot of people competing for a scarce resource, as well as a key performance indicators regime, which is quite challenging and has alongside it a set of penalties if you fail to perform.

During the end of last year and the early part of this year, it was obvious that Garrivan and O'Rourke, which was new to this type of work with us, was having some issues, as were a number of other contractors, in respect of achieving the required standard of performance that the Housing Executive had set. We worked with Garrivan and O'Rourke, as we work with all the other contractors, to try to let them understand what was required of them. In many cases, we set aside the application of damages because there were issues where they maybe did not understand how the contract worked or where we had issues to deal with in respect of their understanding. It was obvious, during the month of March, as Garrivan and O'Rourke had requested a series of meetings with our procurement people to discuss the nature of the contract. In fairness, it raised a lot of issues. It raised the issues of how we were managing the contract, how challenging we were in making sure that we got *[Inaudible.]* at work, and the tender prices that they had come in at and having to deliver the work at those prices. It raised issues about TUPE. As an organisation, it will have won a contract for work under which it would have had the responsibility of transferring under TUPE a set of workers from previous contractors. That was all discussed at length with Garrivan and O'Rourke.

At the most recent meeting on, I think, Good Friday, the chief executive and I met two senior managers from Garrivan and O'Rourke, and it was quite obvious that they had serious issues with trying to deal with the contract, primarily, in and around the value that they were in at. That was one of the big issues, but we could not do anything about that. If you come in on a competition at a given rate, we do not have the flexibilities to change your rate because a range of other players would be affected by that competition.

Unfortunately, Garrivan and O'Rourke went into administration around 22 April. The administrator who was appointed was Cavanagh Kelly. Normally, when firms go into administration, a range of options is open to them to try to stabilise their business and — *[Inaudible.]* However, it was made apparent to us that Garrivan and O'Rourke had gone into administration and was not going to be in a position to rescue the contract. So, we had a number of issues to deal with. The first issue was about continuing to provide a public service to our tenants. There were three contracts — two big contracts in Belfast and one in Lisburn. Secondly, the point you made earlier, Chairman, was the issue of the employees

of that firm. Naturally, when you take over the work, there is the responsibility of trying to look after them.

In working closely with the administrator, we came to a clear position that the contract was not going to be saved. Our first response was to try to put in place an alternative set of arrangements to which we appointed three additional contractors to cover the three modules. There are now three separate contracting firms covering north Belfast, east Belfast and Antrim Street, Lisburn, also supported by our direct labour organisation (DLO).

With regard to TUPE, when it became clear that Garrivan and O'Rourke was not going to continue trading, we were obliged as a public body to establish that the workers from the incoming company do work on the contracts. It is a pretty complex process. In respect of applying our due diligence, we engaged our procurement and personnel people to work with Garrivan and O'Rourke to go through their employee records. Something like 35 employees appeared to be associated with this type of work. To date, through our due diligence, we have been able to establish quite clearly that 26 of those people worked on the contracts. We have transferred those 26 people into the Housing Executive, and they are currently employed by our direct labour organisation. There are queries in relation to a number of other employees, which we are still working through. The key challenge for us is that we have to be absolutely sure that the people who are named do work on the contracts, and we are still trying to resolve those other issues.

As we stand, three contractors are temporarily providing a service. The 26 staff are now working for the direct labour organisation in those three areas, and our intentions are that we will go back to our framework to reappoint new contractors to the three contracts. We have set ourselves a target date of August for trying to have formal arrangements in place where there will be new contractors. The new contractors who will be coming in to manage that business for us will have the same issues with getting the TUPE information. We can stand over the TUPE information for the 26 staff, and we will do our best to resolve the other bits and pieces.

As we stand today, the contract has been terminated. Temporary arrangements have been put in place. Some 26 staff have now secured future employment through us, and we have got back on track with providing the public service that we are charged to do. Were there blips in that? Absolutely. When you suddenly have a contractor who stops doing work over a period, you get calls from tenants saying that jobs have not been done. We need to put arrangements in place to pick up on that. That will take a bit of time to do, and I will not say otherwise. So, it has been a challenging set of circumstances for us. Unfortunately, Garrivan and O'Rourke was trying to sustain a contract in the economic downturn when there were lots of pressures on them exterior to that contract. As you referred to, there are probably similar issues prevailing out there that none of us would be certain about, except to say that these are challenging times. It is a competitive market. The contract is challenging. If you are in on a very tight margin and you do not get the job right the first time around and have to send a man back a second or third time to correct that job, it is going to cost you in resource terms. If we apply damages on top of that, it adds to the pressure that you are facing as a contractor.

That is the broad picture and the broad facts that I am aware of at the minute. I am happy to do my best to answer questions that members might have on that.

The Chairperson: I have two points, Gerry, before I bring in other members. You said that 26 employees of Garrivan and O'Rourke were brought in to the direct labour organisation. I presume that that is not standard practice, or is it? Companies went last year, and people were not brought into the Housing Executive were they?

Mr Flynn: Under TUPE, they would normally transfer to another contractor. We do not have another contractor, so we are duty-bound to manage the service. We have our own direct labour organisation, which manages current contracts for us, and we brought those 26 employees in to guarantee them employment and to help to guarantee provision for future service. They are supplemented by the appointment of additional contractors to carry out the work.

The Chairperson: The last point from me is that you said that you are hoping to wrap the next contractors in the framework by about August. What confidence can we have in the system if we are getting clear indications that companies are saying that the tenders are too low and they cannot sustain them? If we employ new contractors, what confidence can we have that, this time next year, they will not go to the wall as well?

Mr Flynn: When we go out to the market, we have a view of a price schedule of rates that we think the broad work is worth. When you go out to competition and a range of players is competing for a scarce resource, that will potentially drive the price down. We are duty-bound to assess the prices when people submit them; Declan can keep me right on that. If they are abnormally low, we will challenge the contractor and ask them to explain how they will deliver the service at that price. If they provide the evidence that they can sustain the contract at that price, we either pull up and accept the price or we refuse it. If you refuse it, you may be faced with a legal challenge for not giving someone a contract for what they feel that it is worth. So, we challenge them to demonstrate and to provide evidence that they can sustain the contracts at those prices. There is a range of prices for the contractors, which, obviously, I cannot get into. A range of prices is submitted by all the contractors who provide work across our 26 contracts, and they do vary. Garrivan and O'Rourke just got itself into a position where, it would say, a range of factors influenced its position as a business, which resulted in it having to go into administration. We would not want to see any firm in that position, because they are helping us to provide a public service.

Mr Copeland: My question is on a similar theme to those posed by the Chair. I understand that, in some cases, previous contracts for maintenance in east Belfast were awarded on what appeared to be a cost-minus basis: in other words, it was going to cost more to do the work than what it would derive in income. That, to me, would wave a flag and indicate that it was a bit skew-whiff. The provision or the allowance for extras was generally how the contractors managed when the contract was cost-negative: in other words, they were not making any money on the contract but were making the money on extras. That leads to certain difficulties. Was any due diligence done on the stability of the company when the contract was awarded to ensure that the company was stable and that there was no risk? Can you give some indication of the cost differential between the provision of service through the DLO and going down this route? What, on the face of it, made going down this route more economically beneficial? Are the guys who have been transferred under TUPE, which is very nice and lots of people would love to have that opportunity, being paid the same rates now, or are they being paid the equivalent rates that they would have been paid if they had been there all the time? Was there a case to be made for a reassessment or a realignment of the agreed rates that would have ensured that the job was done, even though it might leave you open to challenge, and that the cost differential would then have been less than what it will turn out to be by the time it is over?

I know that it is all very complicated, Gerry, but I always find that in-house is not always the least expensive on the face of it but that it is the least expensive way of doing things in the long term.

Mr Flynn: I will ask Declan to deal with the bit about due diligence and the checks that we do.

We have a small direct labour organisation. A long time ago, the executive used to have a huge direct labour organisation, but, contrary to many other organisations, we outsourced a lot of our work. In many respects, it provides you with a benchmark. If you have your own direct labour organisation, you have an opportunity to compare and contrast prices. At the end of the day, if someone comes in with a price that appears, at face value, to be abnormally low, we challenge them. Declan can explain how we do that. If they can demonstrate that, because of their scale, or because of their purchasing power, or because of the way they operate, they can deliver a cheaper service than we can because of the way we operate, that is fine and that is what competition brings. However, it is a very competitive market. We have contractors who are in on better rates than Garrivan and O'Rourke, and we also have contractors who are performing a service at worse rates than Garrivan and O'Rourke. We have a wide spectrum. They are all finding the current climate very challenging. As you know, a lot of companies are taking on work just to keep the business going, so it is challenging. However, it is our job to make sure that the rates are reasonable for the work, and that is part of the due diligence that we apply when people make submissions. I will ask Declan to say a few words about how we do that.

Mr Copeland: What about the rates of pay for those who have been transferred from Garrivan and O'Rourke into the Housing Executive? Are they being paid more or less, or the same as before?

Mr Flynn: They are being paid the same rates as those they were on when they were in Garrivan and O'Rourke and their same conditions apply. The set of conditions does not change into what Housing Executive employees would be paid. I can get you that information. I do not know whether the rates are better or worse than ours.

Mr Copeland: It would be interesting to see that information. It comes down to the central question of whether direct organisation *[Inaudible.]*

Mr Flynn: We can get that for you.

Mr Declan Allen (Northern Ireland Housing Executive): I will say something about the financial checks that we do. As is the case with all the centres of procurement expertise (COPEs) — the eight COPEs in the public sector — we do our checks in line with Constructionline, which requires contractors to provide references in particular categories of work. Contractors are required to provide their financial accounts on an annual basis. If the accounts are not submitted at a certain time, the company will be suspended and become inactive. Constructionline does all those checks on behalf of the wider construction sector. We go there at pre-qualification stage to check that everything is in order: that the company is active and that it has a financial category value that is appropriate to the size of the contract that we are letting.

It is interesting to note that recently, over the past three or four years or perhaps longer, procurement organisations, especially in the public sector, have increasingly tried to embrace small and medium-sized enterprises (SMEs), which we should do. However, in doing that, we are perhaps starting to lower financial category values in order to allow more companies in Northern Ireland to tender.

When we did our checks, Garrivan and O'Rourke passed. I cannot tell you whether it passed with flying colours, but it passed our criteria. It is a tick box; you either have it or you do not. Once that is done, we do not check it again, because we can check it only at pre-qualification stage. The company was successful in passing those checks; it was eligible to submit a tender to the Housing Executive or any other organisation, for that matter.

We keep an eye on things as we manage the contract. If we pick up anything from our intelligence from talking to other people, or if there are any issues, we will have conversations during the operation of a contract. Certainly, the financial checks that we did were, in my view, robust enough and were exactly the same as would be carried out by any other COPE in Northern Ireland.

Mr Copeland: I want to ask about the published accounts aspect. I have been involved with a number of limited companies, and I am well aware that the time at which you decide to publicise your accounts can be critical in some other ways. It is not quite as hard and fast as you indicated. For the benefit of the Committee, could you find out the dates of the trading period for the financial accounts that were considered when the contract was awarded? In other words, what information did you have available?

Mr Allen: It was April 2012. The accounts that Garrivan and O'Rourke submitted to Constructionline were the April 2012 accounts. We reviewed this matter recently because we wanted to find out how this happened when we were first made aware of it. The April 2013 accounts have not yet been submitted — at least not when we looked — but the April 2012 accounts are what Constructionline used.

If Constructionline has cause to raise issues, it sends the accounts straight to the financial accountants for a more detailed check. At that time, when we were doing our assessment, it would have been — I am sorry; I lied to you. It was the April 2011 accounts; there was a pre-qualification questionnaire (PQQ) before April 2012.

The April 2012 accounts are there now, or they were there three or four months ago when we had a look at it. When the PQQ was done, Constructionline will have checked those accounts and signed them off. We have to take it in good faith that Constructionline has done all that. Garrivan and O'Rourke was active on Constructionline and, therefore, had passed that element of the financial test.

The next test is that we will have set a category value — £500,000 is the category value in general construction build — that it will have to have had in order to be considered to provide the services.

Mr Copeland: Were those the audited accounts that would have been lodged with Companies House?

Mr Allen: I believe so, yes.

Mr Copeland: Construction companies use a number of different types of accounts. One type of accounts will tell you one thing, and another might tell you something else.

Mr Allen: Yes. My understanding is that Companies House requires them eight months after the completion of the audited accounts and Constructionline requires them two months later. There have been occasions — the Chair may be aware of this — when a company has failed to submit its accounts and Constructionline has put it into suspension. On such occasions, we have reviewed the procurement process in use at that particular time.

Mr Copeland: What are the amounts of money owing from the Housing Executive on invoice to the company at the time the event took place? You might have to write back to the Committee with the information because it is detailed. What is the duration, whether it is 30 days, 60 days, 90 days or 120 days, of each category, and how much of that was subject to challenge by the Housing Executive?

Mr Flynn: What I can say, as a general comment, is that the value of outstanding moneys owed to contractors is pretty small if you do a comparison between where we are now and where we were 12 months ago when it comes to how quickly we get inspections done and how quickly we process payments. If the job is right, we pass it and the contractor will automatically be paid. I will provide that information to the Committee.

Ms P Bradley: My question follows on from Michael's. In north Belfast, there is a significant backlog of jobs. That is not only affecting employees, it is affecting tenants as well. That is all because Garrivan and O'Rourke could not meet their commitments. What is the plan? How do you do that with tender? Was there nothing flagged up to say that the tender had come in at such an unrealistic price and question its credibility? The system you have used has failed. Have you made changes to that system to make it more realistic?

Mr Flynn: In some respects, you could argue that the system that we have in place ensures that we provide a quality public service and that contractors will provide a service that is fit for purpose. If the job is fit and passes the test, we will pass it, the contractor will be paid and damages will not be applied. It is as simple as that. It is public money we are looking after.

On the issue of Garrivan and O'Rourke, you are right. In March, in the period running up to Easter, we started to receive calls, not only from tenants but from various elected members, to say that things did not appear to be right. As a result, the contractor had several discussions with our procurement people. However, there is a set of procedures that you need to apply if you want to terminate a contract, and we have to make sure that we stick with them. It did not get to that position, because the contractor went into administration.

You are right that there is a backlog. When you take over what is, in essence, a business, the first priority is to establish what orders are out there, what jobs are not finished, how many of those are part-finished and how many of them have not been started. So, working with Garrivan and O'Rourke's administrative staff has been a big plus in helping us to understand where the company was at with each job. Otherwise, you would have to cancel every single job that has been issued, even though some of them may have been done.

So, there is a piece of work to be done to make sure that you are not double counting and to get to the position where you know the scale of the task. Once you have established that, you have to prioritise all those jobs: are they electrical jobs, are they planning jobs or are they general building jobs? You need to do that so that you can prioritise those works. That is what we are doing, so that we can make sure that the jobs that are of a health and safety nature are done first.

We have been here before with contractors and working a way through these things, and we have successfully done that. I will not say that working our way through this will be without pain to the public, because, alongside picking up the backlog, you have to keep doing the day job, because people who pay their rent are entitled to a repair service. So, it will take a period of time for us to work our way through the backlog. However, we remain committed to resolving that. Hence, we have taken on three adjoining contractors to help us do that, supported by the staff we transferred in from Garrivan and O'Rourke.

Ms P Bradley: North Belfast is my area, and that is an area that has been greatly affected. I welcome that there are three new contractors on board. Have you seen a major difference in their tender price compared to other tender prices?

Mr Flynn: I cannot go into the detail.

Ms P Bradley: I know that you cannot. There should be a percentage to illustrate a difference.

Mr Flynn: It would be fair to say that the rates of those covering the contracts temporarily are much more favourable.

Ms P Bradley: So, we do not foresee a major problem with going in with a lower tender price. They are more realistic.

Mr Flynn: These people have come in at a rate that is more favourable than the existing rate. It is fair to say that. However, once we go to the framework again, we will be going to, in the main, a range of the same players to ask them to come back with prices against the work that we will be putting out to tender. That is as far as I can go on that.

Mr Allen: On the abnormally low tenders and the rates that we would have received this time 12 months ago, we challenge abnormally low tenders. In this contract, there was a particularly abnormally low price. We issued three letters of correspondence to that company, challenging its rate and asking it to prove to us that it could deliver the service for the rate it was quoting. We asked it to provide some sort of profit and loss account that would deal with this particular contract. It provided spreadsheets showing how it could deliver. When we get to that stage, I will not call any contractor a liar. If it is telling me that that is how its business model works, I have to accept it, but at least we will have tested it.

The rates that Garrivan and O'Rourke submitted were substantially less than that abnormally low tender. We tend to look at what everyone has tendered, and that is what the market is dictating are the rates. The majority of the rates that we got were below our schedule of rates. So, if our schedule of rates is zero, there was a range going right down to serious minus figures. We challenged that one, and we had a look at another one. By the time that we got to Garrivan and O'Rourke, there were quite a few that sat in and around what it had tendered. If the market is dictating that that is what the cost of this contract will be, I have to make a recommendation to my director that that is it and that we have to award now. Anything further than that would call into credibility the tender process.

Ms P Bradley: Did several contractors come in at a lower rate?

Mr Allen: Several contractors did. In the contract, we made provision that, if anything such as this were to happen, we could call upon other contractors, to whom we had already awarded contracts, to come in and provide a back-up support service. Because of the severity of this particular situation, they are currently providing more than a back-up support service, and we thank them for that. The contract allows for an increase of 10% in their percentage adjustment to cover the costs of having to come in at short notice to do this and without knowing how long for. Once the new contractor is appointed, they move out and the new contractor goes in, but I cannot promise what their rates will be. I know what their starting point is. They cannot charge us more than their starting rate, and it is up to them whether they want to come in lower. My issue is that, if no one were to come at the secondary stage, we would be left in the current situation. However, we can provide the service; the contract allows for it.

Mr Flynn: It is important to say that, although the rates that contractors tender at is one factor and a very important one, the other factor that we should be aware of is the implications of the cost of TUPE to the contractors that are successful in winning the contracts. You are duty bound to take on that entire workforce under the conditions and the rates of pay. A number of contractors have said that they have borne significant costs in transferring staff into their business under TUPE. Had they been running the business themselves, they might not have paid those rates.

I have to repeat the issue about the extent to which we are performance managing these contractors to ensure that they deliver a quality service to our tenants. When you are working within a tight margin, you need to get job right first time around. If you do not get it right first time around, you have to send a man back to fix that job. If you do not fix it in time, we penalise you, so, in many respects, you could argue that there is a double dunt with having to go back a second or third time with the potential of facing penalties.

So, a number of factors add up to the environment that the contractor can find itself in. As part of that, we are duty-bound under the contract to review them 12 months in. We are now doing work to look at having someone independently look at the nature of the contracts that we have and the nature of the performance management regime that sits within those contracts to see whether they are stable, too challenging or whatever. That is so that we are assured that, as the Committee has been asking, as we move forward, we will not be faced with a whole series of potential contractors having similar experiences, which will, obviously, cause problems in delivering a public service.

Mr Campbell: In preparation for the meeting today, we were given some background material. I am very conscious of the commercial-in-confidence nature of what you describe, but some of that material outlines the value of the contracts. Are those amounts commercially sensitive?

Mr Flynn: No; it is fair to say that those are indicative values based on the number of jobs that we were processing last year and the rates. Those are fine.

Mr Campbell: I do not want to break them down, but the total value looks to be around £4.5 million per annum. Is it fair to say that, over a four-year contract, that would be broadly similar each year?

Mr Flynn: You would expect a normal pattern. It is demand-led, yes.

Mr Campbell: So we are talking about a total contract worth around £18 million?

Mr Flynn: It could have been, over the life of the contract at those rates. Those were the rates that we would have paid under the old contract. So, if you were to come in at, say for example minus 10; we would take 10% off that contract or minus 20 or whatever.

Mr Campbell: Which, on that scale of a valuation, is very, very significant. If somebody comes in at minus 10%, that is almost £2 million of a difference on that scale of a contract over the full four years.

Mr Flynn: That is right.

Mr Campbell: So there is a big onus, then, to get it right. I do not envy anybody's task in making such assessments if there are a number of tenders significantly under this. You are almost left in the position of asking which one of these tenderers can we give the contract to and have a reasonable assurance that they are not going to go bust, because we have looked at a range of what looks like significantly below-cost tenders.

Mr Flynn: Yes.

Mr Campbell: On that scale of a contract, how sure can you and we be that, come August, new contractors will be in place and that this time next year we will not be facing the same situation?

Mr Flynn: That is a very challenging question. All we can do is use our best judgement in terms of the rates that we know. For example, we are operating with our own direct labour organisation, which is at cost. We know the rates that we pay it to run the business, pay the staff and buy the materials. Then we factor in that other companies, perhaps much bigger than the Housing Executive's direct labour force, could have access to purchasing arrangements that we do not. That could drive down the cost that such a company pays for materials. The challenging question is whether, when our procurement people challenge the price that comes in, the company involved can give us evidence that it can work that contract at those rates. We have got to make sure that we do the due diligence.

As I said earlier, a range of rates are in against all the new contractors, and the difference between some of them is quite significant. So we know that there are contractors out there operating at more favourable rates, and we know that there are contractors operating at less favourable rates. The issue for all the contractors is getting it right first time. If you have in place a system of work that will result in you being able to get out, get a job done at a reasonable rate and get it passed by the Housing Executive, contracts will get by. If you have systems in place where you are failing because your work is being failed by our maintenance officers for not being up to standard, it is much more challenging.

I cannot sit here and give you an absolute guarantee that there will not be others, because I just do not know what the general situation is with all the contractors. Suffice to say that generally, across the spectrum of performance indicators in this contract the picture has moved. In the early days, we might

have said that it was moving from red/amber to amber and now to amber/green. People are getting to the position of understanding the exact requirements of the contract. They understand what is expected of them in delivering the job, and they are generally getting there.

Is that causing them problems behind the scenes? It could do so in terms of how they are structuring and supervising their work and how they quality assure the jobs that they do, and delivering that contract may bring those firms additional costs. The general picture across the contractors is that they are getting to the position of complying with the key performance indicators that we have set. That does not set aside the fact that there may be other challenges, and that is why we are asking for an independent gateway-type review that looks at the contract, the performance measures in place and asking one year in, "Are these reasonable ways of approaching and running a maintenance contract?"

Mr Campbell: Further to that, I want to tease out the matter of the TUPE contracts. Did you say that about 26 people were transferred under TUPE?

Mr Flynn: I think that those numbers are right, yes.

Mr Campbell: And you are hoping to have a new contract in place in August.

Mr Flynn: Yes.

Mr Campbell: At which time, will those 26 transfer under TUPE?

Mr Flynn: That is right.

Mr Campbell: You have said that there is no guarantee that problems will not occur with any new contractor. I appreciate that you cannot give an absolute guarantee that the same will not occur again. There are 26 people, who have individual rights that must be adhered to, but are we likely to be in a scenario in the not-too-distant future of the Housing Executive having to make any redundancy payments for those 26 or other employees who transfer over? Could you end up carrying the can because of a series of failed private sector contractors who took on those 26 or subsequent jobs?

Mr Flynn: I do not believe so. My understanding is that, in this example, we transferred 26 people under TUPE into our business with a view to putting in place new contracts in the next two to three months, when those 26 people will transfer out again under TUPE. So, it is a temporary arrangement, where we protect their employment rights. Ultimately, they will move back out and into the new business.

Mr Campbell: Yes, but, at the moment, they are employees of the Housing Executive?

Mr Flynn: That is right.

Mr Campbell: You said in a previous answer that you obviously do not know what the future will bring. We hope that this does not happen, but if the follow-on company from Garrivan and O'Rourke were in the same position this time next year, presumably those 26 people would go back into the Housing Executive.

Mr Flynn: I understand.

Mr Campbell: So, at some point in the duration of this contract, might those 26 people become redundant, because the contract has a finite lifespan of four years, and make a redundancy claim against the Housing Executive rather than against the company that has gone into administration?

Mr Flynn: The TUPE regulations are a complex business. Although a contract might end in four years' time, the protection under TUPE would still remain. If the contract came to a natural end, and we were retendering it, the people losing work would transfer under TUPE to the successful contractors. That is one of the big issues that companies have at the minute. If they are successful in obtaining work, they have to take on an inherited workforce that has worked with somebody else.

One of the big challenges that an incumbent contractor will have is trying to drill down to the bottom line of what it actually costs to pay staff in those firms. I suppose that the one benefit of this — you

just spoke about the 26 — is that we know the exact cost of the 26 employees. So, whoever transfers those people out of the executive under TUPE will know exactly what their costs, bonuses, entitlements and pension arrangements are. That information is in black and white. I think that, at the minute, a lot of companies are struggling to try to get to the bottom line of who is working on the contract, what are their current rates of pay, and what bonuses and pension arrangements are they entitled to. That is a very complex area for them. If it were to come to a natural end, whoever won the new contract would take those people with them, either from us or another private firm.

Mr Campbell: I understand that, but what I am trying to get at is this: if we have a mark 2 Garrivan and O'Rourke position where the 26 end up, for a second time, back in the employment of the Housing Executive at the point where the contract is ending, who picks up the tab for their redundancy, which they would be entitled to?

Mr Flynn: There would not be a redundancy.

Mr Campbell: There would not, even if they had worked on the contract for four years?

Mr Flynn: No. Say we decided that a contract would end in four years' time, but, for some unforeseen reason, the company running the contract went into administration in year 3 and the staff had to be temporarily transferred under TUPE back into the Housing Executive, we would put in place arrangements to re-award that work in the last year, and those people would transfer under TUPE to the successful firm that got the work. So, there is no end to TUPE. If you ran a contract this year that subsequently closed down, the staff could come back to us temporarily and then move to someone else.

The Chairperson: It sounds as though the same workers will be there no matter which company it is?

Mr Flynn: If you look at the current spread of our contractors and where they have won the contracts from, what you find is that their staff have worked in those areas with previous employers. They will have moved around, and that is because of the protection provided under TUPE.

Mr Campbell: The point that I am trying to get at is this: when this contract or any subsequent series of contracts finish, be it in year 2, 3 or 4, and those 26 people are employed by the executive rather than a private company, whether it is O'Rourke, its successor or another successor, is there no liability for redundancy?

Mr Flynn: No.

Mr Campbell: Even if they are in year 4 of the contract?

Mr Flynn: Yes, because it would move to the new successful contractor.

Mr Campbell: So, it would be a series of small contracts?

Mr Flynn: Yes. I maybe have not explained that properly. That is what I am saying about the life of TUPE; people keep moving. It is a very complex area. If a firm is bidding for contract x in location y, it will try to get access to information about how many are working on that contract and what their rates of pay are. It is a complex business.

The Chairperson: A number of members have indicated and are still to speak, so, people, calm down.

Mr Douglas: Gerry, I will come back to the issue of TUPE. You mentioned the 26 workers, but let us leave that to the side and talk about TUPE generally. There might have been situations where part of the problem was that some of those workers were just not up to the job. Does that still mean that they all transfer over?

Mr Flynn: Yes, and then the incumbent contractor has the challenge of ensuring that the people who he has inherited and are working do the job that they are paid to do. They have to manage that situation.

Mr Douglas: Have there been problems where workers have been transferred across under TUPE from one contract to another?

Mr Flynn: There could well be, and, in some cases, that is just down to different work experiences. People have been used to working in a different way, so, when they join a new company that has a different regime, there will be challenges. I cannot comment on the individual experience of contractors, but suffice to say that we have no issues with the people who we are managing.

Mr Douglas: Obviously, a lot of preparatory work is done by a firm that is preparing to take over a contract that has been terminated. What sort of time do you give a contractor to work up a proposal?

Mr Allen: In a situation such as that, we ask our DLO to perform the contracts that it will do for three months. That will give us the time to do the procurement and give the new contractor time for a lead-in period to get prepared and so forth. We also issue TUPE information as best we can to try to short-circuit the whole issue of people's livelihoods and people worrying about their livelihoods. We are going to issue TUPE information because we have it. Our current contracts and all of our new contracts now include clauses requesting that incumbent contractors provide us with all of the employee information that we require and that an incoming contractor would require 12 months in advance so that, when we come to the procurement, we are issuing that.

That is the process that we are going through now to prevent that from happening. We cannot short-circuit it, because the lead-in period involves bringing in new vans, plant, machinery and materials. The contractor has a minimum two-week entitlement to carry out due diligence on the information. In this particular situation, because of the application of a company in administration, that was quicker, and we had to react very quickly to do that due diligence exercise. The problem that I alluded to earlier is that, when we do the secondary competition, we may not get anyone to bid, so our DLO will have to continue on. It is not unreasonable to think that it could continue to the end of the contract and, as Gerry was explaining, transfer to the next contractor. We hope that, in some time in August, we will have new contractors in place and that transfer under TUPE will then occur.

Mr Douglas: Gerry, you mentioned that you are looking at having an independent review. Will that look at all of the aspects of TUPE and the contract?

Mr Flynn: Yes. We will do an evaluation a year in. Because of the experience of a contractor going into administration and the fact that we also had an experience of another contractor giving up a module because we had to replace it, we thought that we would do that now. We have someone independent who had helped us to put the contract together to look at whether the contract is doing what we set out to do. A particular aspect to that is to look at whether the set of key performance indicators (KPIs) that we introduced to monitor the behaviour of contractors are right, whether they are challenging or whether they are too challenging. At the end of the day, our job is to provide a public service at a reasonable rate, and it is our business to do business with others. We want to ensure that it is robust but fair and that the contractors who get the work have an opportunity to run a business out of it. So, we will ask that independent person to look at the performance management regime that sits around that.

I would be being disingenuous if I were not to point out that contractors who run these contracts find our contract management system challenging. Last year, I was at the Public Accounts Committee (PAC) with the chief executive, and two of the big things that we have done out of that is that we have put in place new contracts with a new set of KPIs and retrained our maintenance officers with a view to producing quality inspections. When you add that in to a new regime for people coming in at fairly competitive prices, all of those factors go into the mix for making it a very challenging time for contractors. At the end of the day, we have a public service to deliver with public money, and it is incumbent on us to ensure that that is right. That is why we are having an independent review. It is to step to back and have a look at what we are doing to ensure that it is still robust and fit for purpose. If we need to change it, we will.

Ms Brown: I will be brief. Thank you, gentlemen. To follow up on some of the earlier questions, is there any evidence that the firms that had the previous contracts cherry-picked the profitable work when their contracts were coming to an end and left the less profitable or even unprofitable work for their successors? On the back of that, would it not make sense to take an approach whereby, if a contractor terminated one of their contracts, they would have to terminate them all?

Mr Flynn: I am not in a position to comment on people cherry-picking pieces of work. All that I can say is that these contracts are ring-fenced and they cover areas from A to Z, and that is what gets passed out to the contractors. Declan can keep me right, but the contracts are let in such a way that one person cannot win all of the modules. There is a cap on the number of modules that they can win. For example, Garrivan and O'Rourke won three contracts out of 26, so we have about 10 contractors working on that. I forget what is the exact cap on how many they could win. We do that to make sure that we have a spread of contractors to deliver the work and a sufficient spread so that, should a firm get into difficulties — as has happened — replacement contractors can come in. I can understand that, if you fail on one, you could ask, "Why do you not take it all?" In this case, the firm went into administration, so it lost it all. We have had experience of another contractor that found one of their modules particularly challenging — they had won a number of modules — and they gave that one up. However, they continued to run the other modules.

It is challenging. It is about striking a balance between providing a reasonable service and having a reasonable spread of contractors to avoid putting all your eggs in one basket. We have tried to avoid that. I remember that, 10 years ago, as some people here will remember, we used to have contracts for every single trade: there was a set of plumbing contracts, electrical contracts and building contracts. There were hundreds and hundreds of small contracts. With the introduction of Egan, we moved to a new approach, so we now have more comprehensive all-trades contracts. However, we still have a spread of players. Northern Ireland is a small place, so the spread of players is on the framework. I can safely say that, in the main, the people who run these contracts are already on the framework and perhaps doing work in other places. We think that the system that we have in place is reasonably robust, but the review that we put in place will reinforce that.

Mr Allen: To add to that, you may be referring to the fact that we have different classifications of work from immediate, emergency, urgent, routine, change of tenancy, and so forth. Coming towards the end of a contract, or even when somebody has terminated or is coming towards the end of their termination period, we might not want to issue a change of tenancy three weeks before the end of a contract because we would be concerned that it might not be properly managed because of the effect of TUPE. In this scenario, work was not done by Garrivan and O'Rourke because of the state of the company and the resources that it had. In general, when the previous contractors were moving out, which would have been at the end of July or August last year, they would have had work that they were doing towards the end that could be construed as cherry-picking. However, we also have control over that. An immediate piece of work needs a response in four hours. Therefore, if a contract does not finish until Sunday, contractors can still do work classified as immediate, or emergencies, which have a 24-hour turnaround. The urgent classification has a four-day turnaround. We will manage that. I am not suggesting for one minute that there might not be a degree of cherry-picking where people may say that they cannot do something today for whatever reason, but we are in control of those classifications. Therefore, when emergency work comes in and the contract has not ended, the contractor goes and does it. We will apply the conditions of the contract in full if there is a refusal to do that work.

Mr Brady: Thanks for your presentation. To pick up on Gregory's point, I suppose that the redundancy issue depends on continuity of employment and contracts of employment. Obviously, redundancy funds are set up specifically for employers who cannot or will not pay for whatever reason. Therefore, those issues would be fairly clearly marked, provided, of course, that the criteria are satisfied.

Garrivan and O'Rourke is a south Down company, so they are not in my constituency, but people who work for the company live in my constituency. The information we were given when this happened was that the company had Housing Executive contracts and was doing the work, but the Housing Executive was not paying it. That is, basically, what I picked up. There were going to be sit-ins and all sorts of protests around that. You have clarified the details of the situation and how it impacted on the company and on the workers.

Gerry, you mentioned a figure of minus 10%. We picked up information that companies were getting 30% less than others through tendering, which was unsustainable if you put it into context. You have clarified a fair amount of the issues that we heard in our constituency office. It was a relatively new company, as far as I am aware, and I was not au fait with it. I think it was based in the Warrenpoint/Burren area, which is not in my constituency. The information coming in was that it had been left high and dry.

Mr Flynn: Towards the end of that situation, we had fairly regular contact with the employees' trade union representatives. They contacted us and we did our best to collect the information in order to establish the exact state of play. Once we started to work with the administrator, it was clear what the position was. Our task then was to identify the people who were nailed down to the contracts as quickly as possible so that we could put arrangements in place to transfer them in. You will understand that, as a public body, we have to apply due diligence. The challenge would come if you were to take everybody, and then find that they were not working on those contracts. The public purse is paying for that, so an amount of work has to be done. I would not underestimate the work involved in that.

As for the others who did not transfer to us, some of those cases are still being reviewed. If we can get the information that confirms that they worked on contract A, B or C, they will be transferred under TUPE. However, if we cannot establish that, it is a matter for the administrator of Garrivan and O'Rourke to deal with.

Mr Brady: To go back to the redundancy question, if someone is transferred under TUPE, they may be with the Housing Executive today but they may be with another contractor tomorrow. Therein lies the issue of continuity of employment with a particular employer, and that is where the whole redundancy issues comes in. If you were transferred for six months and then go to a contractor for another six months, you may have continuity of employment but it is not necessarily with the same employer. The liability for redundancy, and so on, lies with the particular employer at the time that you are made redundant. You also have to show that the work is no longer there. If they are transferred to a different employer, it might be different work, but there is work there. Because of the nature of the construction industry, that can sometimes be more difficult to prove.

Mr Durkan: Thank you, Gerry and Declan. I was going to ask about that figure of minus 30%, but Mickey got in before me. In the last monitoring round, or possibly the one prior to that, around £6 million came back from the Housing Executive. That was realised through savings in maintenance contracts. What percentage of the whole maintenance contract budget does that represent? Would you expect the value of orders to be the same each year, and therefore to have that £6 million coming back for the next few years as well?

Mr Flynn: I do not have all the details but I will get them for you. That was part of a whole range of things. We awarded new maintenance contracts during the year and that resulted in savings. If you assume that the volume remains constant and the prices drop, that will generate a saving. We also awarded new heating contracts in the middle of last year, which were planned — new installations with a new set of arrangements. Those contracts were to install, service and carry out all the repairs, so savings were generated from that. We awarded new grounds contracts in the middle of last year as well. A combination of those would have derived efficiencies, but also some other elements of the money would have been returned due to the profile of the starts and the planned work or because some contracts were terminated and were not replaced. Some of the work that was planned was not done, so that would have been part of that financial calculation. I can certainly get you a breakdown of that. We hope that, with the appointment of the new planned contractors and double-glazing contractors this summer, we will be in a position in which we have all the contractors available to us that we need to do planned and response work. Assuming that our projections are right, we should be back on target to spend everything that is allocated to us every year.

Mr Durkan: Obviously, we should applaud efficiency rather than over-scrutinising it. However, when we are talking about minus 30%, it is sailing a wee bit close to the wind.

Mr Flynn: I think that the response maintenance volumes have remained fairly constant over the past number of years. I can provide those figures to the Committee. The only factor that will influence that is, if you have new contracts coming in, you can see the value. The values quoted for Garrivan and O'Rourke will have been based on historical numbers and rates that we paid. It came in at minus a particular amount, so the value of that contract to it would be significantly less.

Mr Durkan: Will the money that was handed back this year — you explained why — affect the amount of money that you get?

Mr Flynn: Generally, our response maintenance budget is part of the business that is ring-fenced. If people pay their rent, they are entitled to a response maintenance service. I think that the total value of the response maintenance budget is about £50 million a year. That has remained fairly constant. The planned budget tends to be up for debate every year, which is down to programmes of work and

timescales for getting work done. There are several monitoring rounds during the year, at which time you have the opportunity to bid for money or hand money back so that it can be recirculated across the block.

Mr Copeland: Gerry, I apologise for coming back to this, but I want to get one thing clear in my mind. Can you assure us that, at the time when the company submitted its tender and signed the contract, it was aware of what it was expected to do, when it was expected to do it, what it would be paid for doing it and the conditions that would be applied in supervising the way in which it was done? Did it know all that when it submitted the tender and signed the contract?

Mr Flynn: Yes.

Mr Allen: Yes.

Mr Flynn: Obviously, it stands over its costs, because it knew those costs, coming in. The terms of the contract are in black and white. It is incumbent on the company to read the details. Whether it would have fully understood how challenging the environment was in which we managed its work is an interesting question.

Mr Copeland: I am speaking from a private contractor background, which is why I know it is difficult.

Mr Flynn: They probably all find it very challenging when it comes to what our maintenance officers accept as quality work now. It is hard to determine whether it fully understood the regime into which it was entering. Suffice it to say that it would not have been on its own in finding it challenging. It is fair to say that all new contractors that we currently work with find our contract management regime challenging when it comes to what we now accept as quality work.

Mr Copeland: I understand that, Gerry. There are so many of those contracts, and the amounts of money involved are vast. You are professional guys, and it is a professional organisation, so it is not for me to advise, but when you issue a contract, you have to do establish whether the person understands what is expected of them, whether they are capable of doing it, and whether they are capable of doing it at the stated cost. You have to identify the strengths and weaknesses. To bring people from a private sector background, which is piracy in some ways — you do what you have to do to get things done — into an environment in which there is a degree of oversight that they might not be used to, I suggest that, to avoid things like this in future, they need to understand every comma, semicolon, speech mark and block capital in the contract. If they do not, it is their fault.

Mr Flynn: We had sessions with the contractors on the award of contracts. We gave everybody a three-month lead-in time in which the new terms and conditions applied but we did not apply damages. If they had three reds for three months in a row, we did not apply the damages; we would have asked whether they understood why they got a red or amber and why they did not meet the target. Thereafter, the damages were meant to be applied, but, in many cases, we considered the application of them, their understanding and their explanations of what went wrong in a given month, and we may not have applied damages in some cases. So, from the executive's point of view, I suggest that we have been doing our best to ensure that they understand.

The Chairperson: In fairness, we covered that earlier.

Mr Copeland: This is the last thing. How far into the contract were they when it failed?

Mr Flynn: They went into administration about six months into the contract.

Mr Allen: Yes; five or six months.

Mr Copeland: Five or six months. Thank you.

The Chairperson: Gerry and Declan, I have just two more points, for the record. One of the factors for those companies is that the contracts from the Housing Executive are not the only work that they are involved in. Because of the economic downturn, they may be losing other work, so they may not be able to survive as a company. The reason for some of them going into administration could have absolutely nothing to do with those contracts. It is a wider reduction of work.

Mr Flynn: Garrivan and O'Rourke were involved in significant other work.

The Chairperson: They then do not get that work, because of the circumstances. The last point that I want to make is that some people are still in disputes about the TUPE arrangements. You have illustrated that with this particular situation where, for 26 of the workforce of Garrivan and O'Rourke, you have determined that this was their core work and, therefore, they qualify for TUPE. Some others may be involved in other elements of the company's work, and, therefore, they do not qualify. What responsibility, if any, has the Housing Executive to help in resolving any of those outstanding disputes?

Mr Flynn: We are doing our best to work with the administrator on those matters. For example, there are queries in and around the other nine staff. I do not know all the detail, but we have been asking the administrator to give us information. Are they on the payroll? Are there payroll slips? Are there any ledgers that show that they were working? Is there any evidence, work tickets or whatever? We ask for sufficient information to help us make a decision. We have been doing our best to work with them to get that information. If Garrivan and O'Rourke can provide that information through the administrator, we will be only too glad to act on it. However, it is incumbent on the previous employer to get us that information. We do our best to work with them to do that.

The Chairperson: OK. There was a similar problem a year or two ago with, I think, H&A Mechanical Services. I think that Garrivan and O'Rourke may have been involved in the mix as well in some issues. There are still some people whose cases are not resolved, and they end up going to tribunals. What I want to know is which Department is responsible? Obviously, in this case, the Housing Executive awarded the contracts. Who has responsibility? It takes a bit of integrity to sort out some of these cases. That is what concerns me.

Mr Flynn: That issue was about the fact that a contractor inherited a previous contractor's work, so two partners were clashing and at odds, and we are stuck as the party managing the contract. It is fair to say that, at the end of the day, this is about personal employee information between two other parties. They needed to get their act together. As Declan suggested, as we move forward, we are trying to put a clause into the new contract to the effect that the contractors are duty-bound to provide information well in advance to prospective employers so that you do not get into that challenging situation. We still would argue, at the end of the day, that it is a matter for the two parties to resolve.

Mr Allen: It is. I can add a bit of anecdotal information. This is something that Sammy had asked about earlier. With respect to problems between the incoming and outgoing contractors, there are occasions where the incoming contractor will keep all the good staff and get rid of what it believes to be the bad staff. They will parachute the bad staff into all the contracts that they are losing so that, when the incoming contractor arrives, he looks at the employee records and says, "This guy did not work here a month ago." When he does his interviews and investigations, that is when the incoming contractor says that the employee does not qualify for TUPE.

Under the law, we cannot get involved in that conversation. We cannot review TUPE. It is a legal thing, and it just happens. Those are some of the issues. That is where those TUPE costs come from, and that is why the incoming contractors have these problems. They believe that it takes only 40 people to run a particular district, but then, all of a sudden, TUPE happens and there are 55 or 60 of them. Then they ask, "Where did all these guys come from?" Therefore, as Gerry has explained, we are putting proactive measures in place to ensure that we know who is performing the work in the contract so that the incoming contractors do not have that issue. That means that the employees are protected. If you do not mind me mentioning it, Gerry, we are working tirelessly to try to find information about the other nine staff to illustrate that they could transfer. When it comes to the appointment of the new contractors, we are trying to protect the staff by having that information so that we will be able to say that they should transfer and there will be no redundancies at all.

The Chairperson: So there will be a tracking system to show that an employee is working on a contract?

Mr Allen: Yes.

Mr Douglas: I mentioned the review of TUPE, but I meant the review of the process. As you said, it is about how you deal with the issue of the nine staff.

Mr Brady: Can I just clarify that TUPE is an interim arrangement, and then the contractor who takes on the job takes over that employment. That takes me back to the continuity and the contracts.

Mr Flynn: Yes. For example, if you were successful in winning the three contracts, the 26 people that we currently have in our direct labour organisation would transfer to you.

Mr Brady: They would start their employment with you, and there would be no continuity.

Mr Allen: I believe that there would be; that is part of the issue. All their terms and conditions, pensions and leave would transfer across.

Mr Brady: That goes back to the point about continuity. Hopefully, it would be favourable to them if the contract was to last.

The Chairperson: Gerry and Declan, thank you very much for coming here this morning. Your information was very helpful. Good luck with dealing with the rest of the employees in this situation. In the overall context, we are concerned about the integrity of contracts, in so far as companies are being forced to come in too low, and, inevitably, more people will go bust. That will lead to these kinds of headaches, a breakdown in maintenance being carried out in people's houses, employees being left in limbo, and time spent and wasted through your endeavours as well, which you could be using wisely elsewhere. No doubt, we will hear more about this in the future. Thank you both very much.