ACTU Submission

to the Senate Finance & Public Administration References Committee Inquiry into Commonwealth Procurement Policies

December 2013

ACTU
australian council of trade unions

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Introduction

The ACTU represents nearly 2 million working people and their families. Many more have their pay and conditions of employment shaped by the collective bargaining conducted by our affiliates.

We welcome the opportunity to comment on the issues raised by the Terms of Reference that frame the current inquiry being conducted by the Finance and Public Administration References Committee ('the Committee').

Many of those we represent are employed in industries that are directly affected by Commonwealth procurement policies. These include the Federal public service, construction and the manufacture of vehicles, defence equipment and paper. A number of our affiliates, such as the CPSU, AMWU and CFMEU will be making their own submissions to the Committee's inquiry. We refer the Committee to these submissions for more detailed discussion of industry-specific matters relating to procurement.

The Commonwealth government spends billions of dollars every year providing and acquiring goods and services that are essential to the fair and productive operation of our economy and society. However, Commonwealth procurement is not akin to spending by private firms which is typically determined by narrow commercial criteria. Government has unique representative, social and ethical responsibilities to the Australian community. Therefore, government procurement policy has a legitimate role to play in supporting domestic employment, local industrial development and fairness in the workplace.

Problems of Outsourcing

There appears to be some overlap between the Committee's current inquiry and the work of the National Commission of Audit. The ACTU made a detailed submission to the Commission in November. A copy of that document is included with this submission.

In summary, the ACTU believes there is significant evidence from the experience of outsourcing central government activities in Australia and the UK to doubt that it represents good value for government, taxpayers and service users. The assumption that private sector providers are necessarily more efficient and effective than public sector departments and agencies is misplaced and often results on cost-overruns and perverse outcomes for those, such as job seekers, who rely on government support.

We present evidence and arguments in support of this view in our submission to the Commission of Audit.

The Committee should recommend to government that prior to making any decisions to outsource Commonwealth government work, relevant departments and agencies should be required to conduct and publish detailed examinations of the potential long-term costs and risks of doing so, including assessments of the capacity for the public service to continue to perform such work. Such examinations and assessments should seek and consider evidence from the relevant trade unions.

Procurement & Employment

Australian Industry Participation

The Commonwealth government should be committed to maximising retention and creation of jobs in Australia as well as supporting the growth of Australian businesses and should seek to utilise its procurement practices to that end. Therefore, while having regard to whole-of-life value for money considerations and Australia's international trade agreement obligations, departments and agencies should also assess tenders on the basis of full and fair Australian industry participation opportunities retained or created in Australia – including through effective utilisation of the Australian Industry Capability Network (ICN). These considerations should also be reflected in the Department of Finance (DOFD) Government Procurement Guidelines.

Government should avoid a 'whole of contract' procurement approach in purchasing manufactured goods that preferences companies that can provide all the goods required at the expense of excluding small to medium local suppliers from participation in the tendering process.

Contracts to small and medium local suppliers for goods and services should, where applicable, be maximised to support the growth and capacity of these businesses. This should apply also to the use of 'Common Contracts Purchasing' where only one company is awarded a contract to supply all of a particular good to governments (e.g. stationery supplies, IT, motor vehicles). The use of a variety of suppliers will not only provide for ongoing competition but will also ensure that smaller, local businesses are supported. In addition, the government should retain the $27.7 million Enterprise Solutions Program which aims at supporting SME businesses in winning government work through capacity building and technology development and deployment.

Contracts should only be awarded totally offshore in circumstances where it is evidenced that the goods cannot be sourced locally. Where components of the goods are thus available locally, preference should be given to those contractors who maximise the use of local providers.

Government procurement should support opportunities for small to medium sized enterprises to supply Australian and New Zealand content in all goods and services procured.

Therefore departments and agencies, following revised DOFD procurement guidelines, should be required to purchase goods from Australian and New Zealand suppliers who are price and quality competitive and who comply with the terms of the broader economic and social aims of procurement policy. Favourable consideration should be given to the tenderer who maximises the employment of Australian and New Zealand citizens and permanent residents.

All levels of Government should re-examine their procurement policies in light of those applying in the United States and the European Union which give preference offsets for small and medium sized enterprises. Where contracts are awarded on the basis of goods and services supplied using local capacity a contractor should not be allowed to subsequently offshore that work during the life of the contract.

In the event of contracts being awarded offshore, successful tenderers should be required to demonstrate compliance with the relevant employment standards contained within the UN human rights instruments, the ILO Conventions and, where applicable, the OECD Principles for Multi-National Enterprises. Opportunities should be afforded to stakeholders to verify such compliance via appropriate compliance mechanisms.

Tenders of over $20 million already attract a requirement for an Australian Industry Participation (AIP) plan, to ensure Australian industry has a fair and equal opportunity to win this work. Under existing legislation, these plans are administered and assessed by the Australian Industry Participation Authority. This requirement and this Authority should be maintained by the current Government. In addition to AIP plans successful tenderers must be required to enter into contractual arrangements that maximise opportunities for Australian industry participation. Where it has been determined that a reasonable opportunity exists for the local provision of such services and material, those contractual arrangements should include:

- Local skill development including investment in training for higher level broad

based qualifications and retraining of existing workers;

- Effective labour market planning and forecasting;

- The use of skilled migration only where a genuine skills shortage has been demonstrated to exist; and

- The use of temporary resident labour only where Australian resident workers are not available.

In assessing tenders for services contracts that have a high labour content, the government should take particular care to ensure sufficient staffing levels and to ensure that sufficient payments are available so that the services can be delivered. Sufficient funds must be allocated to enable correct payment of wages and entitlements. Any such contract should not be awarded to the exclusion of a public sector agency that may be able to deliver the service.

The Commonwealth government should adopt a single consistent definition of the term 'employee' to be used across the public sector in workplace relations and procurement. The government should also require public sector agencies to report all details of contracts with a high labour content, including for the purposes of identifying and remedying sham contracting arrangements (particularly where 'employees' have unknowingly entered into independent contracting arrangements).

<u>Demand-Side Procurement Policies</u>

The Commonwealth government should examine and implement demand side procurement policy tools to promote the use of Australian goods and services and to promote innovation. In particular government should:

- Ensure Australian standards are applied to all procurement and are required to be applied on all projects that have AIPs;

- Investigate targeted demand subsidies to drive innovation;

- Commit to retaining the Enterprise Solutions Program;

- Consider the use of regulations to mandate products or a product mix designed to maximise local content; and

- Ensure strong local content procurement policies on all social and community infrastructure projects.

Trainees and Apprenticeships

Government contracts should require contractors to provide apprenticeship/traineeship positions. The government in consultation with unions and employers should set required levels for each industry.

Aboriginal and Torres Strait Islander Employment

The previous Federal government demonstrated a strong commitment to Aboriginal and Torres Strait Islander employment by implementing the Commonwealth Procurement Guidelines and the Indigenous Opportunities Policy. This commitment was reinforced by a commitment to ensuring effective implementation and transparency in reporting accountabilities against the Indigenous Opportunities Policy. This policy and reporting framework constitutes a valuable means of promoting employment among a deeply disadvantaged and vulnerable section of our community and should be retained.

International Labour Standards

The Federal government should ratify ILO Convention 94 on the payment of market wages in government procurement. The rationale behind the Convention and associated Recommendation (No. 84) lies in the desire to prevent public authorities from entering into contracts involving employment of workers at conditions below an acceptable level of social protection. The Convention encourages good governance and encourages public authorities to act in a socially responsible manner by requiring tenderers to align themselves with locally established prevailing pay and other working conditions as determined by law or collective bargaining.

Procurement and Fairness at Work

The Fair Work Principles

No government contracts should be awarded on a basis that a competitive price is arrived at by undercutting the wages, conditions and rights of employees. Government must take into account a range of considerations when procuring goods and services, including considerations which support the creation of good quality jobs. Those performing government work should be required to demonstrate the ways in which they meet ILO labour standards and the United Nations Principles for

Responsible Investment (UNPRI) environmental, social and corporate governance (ESG) standards.

Accordingly, all contractors who perform government work (including sub-contractors in the supply-chain) must be able to demonstrate compliance with all relevant employment-related legislation and other industry-specific workplace standards. Ongoing compliance must be a contractual requirement so that a breach of any relevant industrial law or law relating to employment will also constitute a breach of the procurement contract.

Further, a commitment to adhering to industrial legislation and other relevant industry-specific workplace standards should be a pre-condition for the ability of a potential contractor to submit a tender.

Compliance with the Fair Work Principles, which came into effect on 1 January 2010, must remain a condition of participation in government procurement contracts. Compliance with employment related laws – including those relating to occupational health and safety, workers' compensation, superannuation, immigration, anti-discrimination and taxation – must be ensured.

Building and Construction

Commonwealth procurement decisions must not be made by reference to standards that detract from the Fair work Act.

The legislation which established the Australian Building and Construction Industry Commission, which then became Fair Work Building Industry Inspectorate, has established a connection between procurement decisions and industrial relations policy.

While the legislation has long provided for the relevant Minister to issue a legislative instrument known as the 'Building Code' to give effect to this, this did not occur until the former Labor government issued the Building Code 2013.

Prior to this time, there was an administrative arrangement in place where the National Code of Practice for the Construction for the Construction Industry (established by the Australian Procurement and Construction Council) and 'implementation guidelines' applied as a procurement policy for Commonwealth funded work in the Building and Construction Industry.

The reach of these instruments was expanded in 2005 such that they applied to all privately funded Australian-based construction activities of entities that receive Australian Government funded, or partly funded, construction contracts. The consequence was that entities seeking Commonwealth work needed to be compliant not only in respect of their Commonwealth funded work, but also all other work performed in that industry sector.

Neither the National Code of Practice nor the successive revisions of the Implementation Guidelines have implemented, let alone recommended, any measures promoting the use of Australian made materials or the employment of Australian citizens. The instruments have almost exclusively been concerned with de-unionisation and dictating the industrial relations policy of businesses operating in the building and construction sector, including in the following ways:

- Whole of project industrial agreements were not permitted unless the project cost exceeded $25 million and the federal government permitted the making of the agreement;

- Union insignias (such as helmet stickers) were not permitted on building sites;

- Union delegates were not permitted to address site inductions;

- Employers were prohibited from inviting officials or employees from unions onto building sites for any reason;

- On site Health and Safety representatives were prohibited from investigating breaches of health and safety laws if (and only if) they were also on site union delegates;

- Independent arbitration of industrial disputes (for example by the Australian Industrial Relations Commission, as it then was) was not permitted unless the arbitration was conducted in accordance with the Code and the Guidelines;

- Minimum staffing requirements were prohibited;

- Redundancy decisions and criteria were non-negotiable in agreements with workers or their representatives;

- Certain anti avoidance and job security provisions were prohibited in agreements with workers or their representatives (e.g. replacement of full

time work with casual work, requiring that subcontractors apply no less favourable conditions to their workforce);

- Site allowances were prohibited unless they were the subject of registered agreements;

- Registered and Unregistered collective agreements, Australian Workplace Agreements and common law contracts of employment with employees could not provide for employees union membership fees paid by payroll deduction.

Amendments to the implementation guidelines under the former government sought to harmonise them to some extent with the Fair Work Principles. Those principles, in summary form, made compliance with the Fair Work Act 2009 a key consideration in the letting of new contracts and the management of contracts on foot. This extended to deeming breaches of the provisions of the Fair Work Act 2009 to be a breach of the Commonwealth funded contract.

The Building Code 2013, as it presently stands, largely reflects that approach. Notably it explicitly requires contractors to ensure that persons engaged to work for them are legally entitled to work in Australia as well as ensuring that they comply with Australian law in relation to the sponsorship, engagement and employment of persons who are not Australian citizens.

However, some restrictions remain that impose limitations not found in the Fair Work Act. For example, there are prohibitions on the making of unregistered written agreements with employees or their representatives.

As part of the current government's announced policy to re-establish the Australian Building and Construction Commission, it intends to issue a revised Building Code.

The current inquiry by the Committee should recommend to government that a revised Code be fully harmonised with the Fair Work Principles.

Tackling Non-Compliance

Government has an important role to play in ensuring that when it spends taxpayers' money to purchase goods and services, only those companies that can demonstrate full compliance with all relevant employment laws, standards and best industrial relations practice will be considered as potential contractors.

Appropriate pre-qualification requirements for the tendering process are particularly necessary in industries with high non- compliance risk, such as those characterised by low pay, low bargaining density, high levels of sham contracting arrangements, work of an insecure nature (such as where work is predominantly casual) or where there are vulnerable workforces (such as where there is a high prevalence of migrant workers or young workers). Pre-qualifications appropriate to each industry should be determined on a tri-partite basis, beginning with industries that are at the highest risk of non-compliance, with a view to creating a short list of pre-requisite companies.

As a base, pre-qualifying requirements should compel tendering contractors and suppliers to produce sufficient evidence to demonstrate:

- That, consistent with the object of the Fair Work Act to promote enterprise-level collective bargaining, current enterprise agreements exist which cover the work that will be done under the procurement contract;

- That no worker will be subject to victimisation of any kind as a result of their choice to be a member of a union, and that there is appropriate recognition of the role of union delegates and unions generally in representing workers;

- That applicable right of entry provisions by authorised union officers and health and safety representatives are observed for legitimate purposes including the recruitment of members, dealing with member grievances and investigating any suspected breach of industrial awards, agreements or legislation, and access to an inspection of the relevant employer records by a union;

- That employees will be provided with appropriate training, supervision, equipment and materials to enable them to perform their job safely. This should extend to the provision of information about how training will be conducted, and provision of half-hour, paid industrial rights inductions conducted with a representative of the relevant union upon commencement of work;

- That any work which is to be sub-contracted to other contractors is performed by bona fide contractors only; and

- That contractors will provide information that will allow government agencies to verify that the terms and conditions of a procurement contract (including sub-contracted work) are being met. This should include audit

procedures, involving unions, to identify and eradicate any sham contracting practices, and to ensure the Fair Work Act and collective agreement provisions are being upheld. In addition, subcontractors or labour hire employees working on government contracts shall be hired on no less terms that those applying to workers employed or engaged directly.

There must also be proper consideration of the security of data about citizens held by Governments when making decisions about government contracts.

Contractors who perform government work should be contractually responsible for any sub-contractor's adherence to the above requirements and the requirements of the law, and must be liable for the remedies available should the sub-contractors breach this policy.

Prospective suppliers should also be required to undertake, at the tendering stage, that they have not been subject to any adverse judgment for a breach of any relevant law during the past two years and are not subject to any outstanding claims (excluding decisions under appeal).

Where it is alleged a contractor has breached any of the above obligations or other industrial relations obligations, as an initial step the government should consult with stakeholders (including the relevant union) about the best means to ensure compliance. If the matter remains unresolved, the matter should be referred to the Fair Work Commission for resolution and/or determination. This should be a requirement of the procurement contract.

Where a breach has occurred the government agency must be able under its contract to apply remedies which include:

- Ordering rectification of the breach;
- Formal warnings;
- Partial exclusion from tendering, i.e. a reduction in the number of tendering opportunities;
- Preclusion from tendering for any work for a specified period;
- Contract cancellation;
- Financial penalties;

- Reporting of the breach to relevant regulatory and enforcement authorities;

- A combination of any or all of the above.

Outworkers

All government contractors (including sub-contractors in the supply chain) who give work out and/or engage outworkers in the textile, clothing and footwear industry should be accredited with Ethical Clothing Australia and must comply with any relevant Federal and State legislation, awards, industrial instruments and codes of practice relating to the performance of work by outworkers.

Tenderers (including any sub-contractor in the supply chain) who tender to provide goods to government that could be made by an outworker must provide evidence of compliance with applicable awards and legal obligations relating to the giving out of work and the engagement of outworkers when they lodge a tender. The evidence must be provided in a statutory declaration and must include but is not limited to:

- The name of the relevant award or workplace agreement (howsoever described) or other relevant employment law;

- Registration number of factory or workshop, where applicable;

- Registration number as an employer giving out work, where applicable;

- Whether outworkers have previously been engaged;

- Evidence of compliance, in the twelve months prior to the tender being lodged, with the applicable award or other relevant employment law requirements relating to the lodgment of periodic work lists of employers and other parties to whom work has been given, where applicable;

- Evidence of workers' compensation insurance such as a renewal notice;

- Evidence of current superannuation fund membership and contributions;

- Location of time book, sheet or records required to be maintained under the applicable award and industrial legislation or other relevant employment law.

Unless the statutory declaration and information is provided, a tender should not be considered.

Where a tenderer tenders to provide goods to government that could be made by an outworker the government should notify the Textile Clothing and Footwear Union of Australia ('TCFUA') and consult with the TCFUA about the compliance of the tenderer with the industrial instruments and statutory declaration requirements discussed above. If such a tenderer is successful in its bid to supply goods to the government, the government should notify the TCFUA.

Transparency and Accountability

The process for tendering must be transparent. Prior to a decision on a successful tenderer, the government should publish a full list of tenderers, with both unions and employer organisations having the right to supply information to the government agency about any potential contractor (including any potential sub-contractor in the supply chain) that it believes has a history of acting contrary to law or behaving in a manner which does not comply with the principles of freedom of association or other unethical practices.

The letting of government contracts must also be transparent with strict limitations on the use of commercial-in-confidence exclusions. All government agencies must maintain a register of commercial-in-confidence exclusions, to be periodically tabled in Parliament and subject to scrutiny.

The Federal government must publish a full list of successful tenders, including:

- The name of the company or individual who holds the contract and all sub-contractors they will use in the supply chain along with their business addresses;

- The location (including specific sites and size of sites), value and duration for performance of the contract;

- Whether outworkers could be used to produce the goods under the contract and if so whom and at what location; and

- Tenderers' answers to industrial relations and occupational health and safety (OHS) questions referred to above.

The government must also require agencies to disclose details of any sub-contract arrangements including the identity and location of sub-contractors.

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