

**SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS**

QUESTIONS ON NOTICE

Inquiry into the DEEWR Tender Process to award employment services contracts

EEWR_SIH_H65

Senator Fifield asked on 11 June 2009, EEWL Hansard page 82.

Question

Could the legal advice the department sought as to whether a contract variation of existing Job Network contracts could have happened, be provided to the committee?

Answer

Legal advice from the department's internal legal advisers on the obligation to re tender the employment services contracts and other matters was provided in early 2008. A summary of such advice (in so far as it relates to the obligation to tender for employment services contracts) is provided at Attachment A.



Australian Government

Department of Education, Employment and Workplace Relations

Summary of Legal Advice in relation to the possible extension of the Employment Services Contract 2006-09

Introduction

1. Legal advice was provided by the Department's General Counsel in early 2008 in regard to, inter alia, the legal issues surrounding a hypothetical extension of the Employment Services Contract 2006-2009 ('the Contract') beyond 30 June 2009.
2. The advice was given in the context of the Commonwealth Procurement Guidelines (CPGs) as current at the relevant time (noting there have been no relevant changes to the CPGs), the Commonwealth's financial management and accountability legislation, and the Australia-US Free Trade Agreement (AUSFTA). The following is a summary of the advice provided in this regard.

The legal basis of the CPGs and their implications with respect to contract extensions and variations

3. The CPGs are issued by the Finance Minister under the *Financial Management and Accountability Regulations 1997* (see FMA Regulation 7). They establish the core procurement policy framework and articulate the Government's expectations of all departments and agencies (and their Ministers and officials) subject to the *Financial Management and Accountability Act 1997* (FMA Act) when performing duties in relation to procurement.
4. FMA Regulation 8(1) provides that Commonwealth officials must have regard to the CPGs when procuring property or services. FMA Regulation 8(2) provides that an official who takes action that is not consistent with the CPGs must make a written record of the reasons for doing so. This Regulation implies that agencies may make a procurement decision that is not consistent with the CPGs if it is the most appropriate lawful decision to achieve the procurement objective.
5. The CPGs were revised and reissued in January 2005 to give effect to the AUSFTA, and included the Mandatory Procurement Procedures (MPPs)¹. Consequently, the apparent latitude provided by FMA Regulation 8(2) applies only to the non-mandatory parts of the CPGs. This is because FMA Regulation 9(1)(a) provides that an approver must not approve a proposal to spend public money unless satisfied, after reasonable inquiry, that it is in accordance with the policies of the Australian Government. Accordingly, under FMA regulation 9, approvers of proposals to spend public money (e.g. authorised public servants and Ministers), including a spending proposal relating to a procurement activity, must comply with the MPPs contained in the CPGs, which

¹ See Page v, "Foreword" CPGs

give effect (in relation to the AUSFTA) to the broader Commonwealth policy of complying with international treaties that the Government has entered into.²

6. Relevantly, paragraph 1.4 of the CPGs provides that “(in) particular, an approver must be satisfied that policies implementing international obligations, including those set out in these CPGs, are complied with”. Paragraph 8.4 of the CPGs provides that:

These mandatory procurement procedures also incorporate the Government's policy with respect to discharging specific international obligations in Government procurement. FMA agencies are required to apply these mandatory procurement procedures in accordance with FMA Regulation 9.

7. Further, paragraph 3.1 of the CPGs specifically refers to the AUSFTA as a relevant international obligation. Advice given by the Department of Finance and Deregulation (‘Finance’) is that complying with the CPGs will ensure that an agency meets all relevant AUSFTA obligations.³
8. Paragraph 3.4 of *Guidance on Complying with Legislation and Government Policy in Procurement January 2005*, Financial Management Guidance No 10 provides in relation to FMA regulation 9(1)(a) that "while it may be possible to take action that is not consistent with the CPGs, officials cannot take action inconsistent with ... Australian Government policies ... that is, if a spending proposal relating to a procurement activity is not in accordance with an Australian Government policy, regulation 9 will not be complied with and the spending proposal will not be able to be approved."
9. In summary, through the interaction of FMA Reg 9 and the CPGs, Commonwealth public servants, and Ministers, are currently bound by the obligations imposed by the MPPs (which, as discussed above, incorporate treaty obligations). The most relevant obligation in this context, being the obligation for the Australian Government to conduct an open procurement process for procurements valued at greater than \$80,000.

Contract Extensions and Variations

10. Current Finance advice provides that:

A contract variation may be allowed provided the scope and relative size of the procurement remain the same as the original contract. For example, if the existing contract will be enhanced by a variation, and the property or services are basically the same as the contracted property or services, it could be argued that it is a value for money proposition to vary the contract. Additional work that changes the scope of a contract should be treated as a new procurement. **Similarly, variations to include new extension options generally increase the scope of the contract and are therefore not allowed.**⁴ (emphasis added)

Any extension of the Contract will increase the total value of the original procurement. A material increase in the total value of a procurement is an increase in the scope of a procurement and will constitute a new procurement for the purposes of the MPPs.⁵ Accordingly, it is not possible to materially vary the Contract to include a new extension clause without breaching the MPPs.

² See sections 3.3 and 3.4 of *Guidance on Complying with Legislation and Government Policy in Procurement January 2005*, Financial Management Guidance No 10 (issued by the Department of Finance and Administration).

³ See “Interacting Policies – International” - *ibid*

⁴ http://www.finance.gov.au/procurement/faqs_mpp_extensions_variations.html at 11 July 2007

⁵ *ibid* and see sections 8.10 and 8.12, CPGs.

11. There has been one contract period (ending 30 June 2006) since the AUSFTA. The department was able to extend contracts at this time as there was an existing extension clause which had not been exhausted. For the 2006 – 2009 contracts, approximately 95 per cent of Job Network business was extended, pursuant to unspent extension clauses in the relevant contracts. Approximately 5 per cent of the Job Network business was put to open tender. A similar approach was adopted for NEIS.
12. According to Finance advice⁶, where there is an extension clause that has not been exhausted, a contract can be extended in accordance with that clause and the CPGs, when best value for money would be achieved by exercising the option. The rationale is that the right to extend the contract has already been purchased in the original procurement. However, Finance advice also states that:

If an existing contract has no (unspent) provision for extension, the contract cannot be extended. ... Additional work that changes the scope of a contract should be treated as a new procurement. ... variations to include new extension options generally increase the scope of the contract and are therefore not allowed.⁷
13. For the approximately 95 per cent of the Job Network and 84 per cent of NEIS contracts that were extended in June 2006, the relevant extension clauses were used to their full extent. Accordingly, the relevant clauses are now exhausted as regards these programmes (i.e. the majority of Job Network and NEIS business), and cannot be used to extend the relevant contracts.

Direct Sourcing Procurement (the original advice canvassed the possible application of paragraph 8.65(b) of the CPGs – and a summary of this part of the advice is set out below)

14. In extreme circumstances, the Commonwealth could contract with existing providers pursuant to the exemption under paragraph 8.65(b) of the CPGs. This paragraph provides that:

An agency may only conduct procurement through direct sourcing in the following circumstances:

...

- b. *where, for reasons of extreme urgency brought about by events unforeseen by the agency, the property or services could not be obtained in time under open tendering procedures;*

15. At the time of providing the advice, there was approximately 18 months until the Contract expired. At all relevant times, there was no requisite ‘extreme urgency’, let alone one that was ‘brought about by events unforeseen by the agency’. In this regard, previous and current advice published by Finance, gives a natural disaster, such as a tsunami or Cyclone Larry as a typical example of an unforeseen event that might trigger the application of paragraph 8.65(b). In order to meet our AUSFTA obligations, Finance has not been inclined to take an expansive view when interpreting paragraph 8.65(b) of the CPGs.

⁶ http://www.finance.gov.au/procurement/faqs_mpp_extensions_variations.html at 11 July 2007

⁷ http://www.finance.gov.au/procurement/faqs_mpp_extensions_variations.html at 11 July 2007

Conclusion

16. In these circumstances, absent an available CPG exemption or exception, or absent any unexhausted extension option, the Commonwealth was obliged to go to the market to procure further employment services. This became all the more necessary, as what was ultimately contracted for under the Employment Services Deeds 2009 – 2012, was fundamentally different to what was contracted for under the Employment Services Contract 2006 – 2009. It was, and remains the view of the Department's General Counsel, that there were no relevant exemptions or exceptions or available contract extension options, or any other basis for extending the Employment Services Contract 2006 – 2009. Consultation with Finance confirms that view.