

Government Procurement

1. The federal and state governments expend billions of dollars every year on the acquisition of goods and services. Where it is in the public interest to contract with external suppliers of goods and services, governments need to be mindful of – and committed to – the need to ensure that their expenditure of taxpayers' money encourages the creation and retention of good jobs within Australia. The Australian Government's procurement policy should have as its objective the retention and creation of good, unionised jobs and the development and support of local industry in Australia requiring that contractors supplying goods and services to government adhere to ethical employment practices.

Application of the Australian Government Procurement Policy

2. Currently, and under the Commonwealth Procurement Rules which will become effective from 1 July 2012, the scope of the Federal government's procurement framework is limited to the acquisition of goods and services by a government agency on its own behalf or on behalf of another agency or a third party.
3. In recognition of the fact that direct government procurement represents only a proportion of the money the Australian Government expends each year, procurement policies (including those that promote good workplace relations outcomes and Australian industry participation) should be extended to other areas of government.
4. Specifically, procurement policy and rules should be extended to:
 - a) the purchase of goods and services by the Australian Government including all budget agencies, statutory authorities and government owned corporations;
 - b) organisations contracted to the Australian Government to provide goods and/or services; and
 - c) funding agreements between the Commonwealth and State or local governments, community organisations and NGOs and any other organisation in receipt of Commonwealth monies, including funding by way of grants, project funding, investments, sales by tender, procurement of goods and services for resale or for the production of goods for resale, and other government funding.

Fair Work Principles and Pre-qualification of contractors

5. 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 quality and ethical jobs. Those performing government work must 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.
6. 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.
7. Further, a commitment to adhering to industrial legislation and other relevant industry-specific workplace standards should be a pre-condition to the ability of a potential contractor to submit a tender.
8. Congress notes the *Fair Work Principles*, which came into effect on 1 January 2010, and which set out requirements on suppliers for continued participation in procurement contracts with the aim of ensuring that suppliers comply with the *Fair Work Act* as well as with relevant industrial instruments and employment-related laws. Compliance with the *Fair Work Principles* must remain a condition of participation in government procurement contracts, and compliance with employment related laws – including those relating to occupational health and safety, workers' compensation, superannuation, immigration, anti-discrimination and taxation – must be ensured.
9. Congress further notes the 2011 *Cleaning Services Guidelines* which compels potential suppliers who are submitting tenders for work in the cleaning industry to provide information and evidence, at the tender stage and thereafter, demonstrating compliance with mandatory practices including practices relating to inductions, training, supervision, use of equipment, duty schedules, fair and reasonable workloads, freedom of association, consultation and dispute resolution. These guidelines were implemented in recognition of the history of underpayment, exploitation and unsafe work practices in the cleaning industry.
10. Similar requirements ought to be implemented across all industries commencing at the tendering stage. 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 tripartite 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.

11. As a base, pre-qualifying requirements should compel tendering contractors and suppliers to produce sufficient evidence to demonstrate:
 - a) 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;
 - b) 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;
 - c) 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;
 - d) 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;
 - e) that any work which is to be sub-contracted to other contractors is performed by bona fide contractors only; and
 - f) 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.
12. There must also be proper consideration of the security of data about citizens held by Governments when making decisions about government contracts.
13. 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 (as outlined below) should the sub-contractors breach this policy.
14. Where a government contractor or tenderer provides or seeks to provide goods to government that could be made by an outworker, it must comply with the additional obligations outlined in Attachment A.

15. Prospective suppliers must also be required to undertake, at the tendering stage, that they have not been subject to any adverse judgement for a breach of any relevant law during the past two (2) years and are not subject to any outstanding claims (excluding decisions under appeal).
16. Where it is alleged a contractor has breached any of the above obligations or other industrial relations obligations, as an initial step the government will consult with stakeholders (including the relevant union) about the best means to ensure compliance. If the matter remains unresolved, the matter shall be referred to Fair Work Australia for resolution and/or determination. This shall be a requirement of the procurement contract.
17. Where a breach has occurred the government agency must be able under its contract to apply remedies which include:
 - a) ordering rectification of the breach;
 - b) formal warnings;
 - c) partial exclusion from tendering, i.e. a reduction in the number of tendering opportunities;
 - d) preclusion from tendering for any work for a specified period;
 - e) contract cancellation;
 - f) financial penalties;
 - g) reporting of the breach to relevant regulatory and enforcement authorities; and
 - h) a combination of any or all of the above.

Transparency and Accountability

18. The process for tendering must be transparent. Prior to a decision on a successful tenderer, the government will 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.
19. 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.
20. The federal government must publish a full list of successful tenders, including:
 - a) 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;

- b) the location (including specific sites and size of sites), value and duration for performance of the contract;
- c) whether outworkers could be used to produce the goods under the contract and if so whom and at what location; and
- d) tenderers' answers to industrial relations and occupational health and safety (OHS) questions referred to above.

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

Australian Industry Participation

22. The government should be committed to maximising retention and creation of jobs in Australia 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 will 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).

23. The Federal Government is currently initiating changes to its Australian Industry Participation Policy (AIP). The first changes came in the Government response to the Australian Industry Participation Working Group report on implementation of measures to extend the AIP (April 2012). The time has now come to take the next step. This should include the Minister for Industry and Innovation, in consultation with State counterparts, establishing a joint Commonwealth-State review mechanism for renewing the 2001 National Framework Agreement for Australian Industry Participation. Such an agreement should give further consideration to a number of issues including:

- a) rationalisation of the overlap and duplication that project developers are required to undertake with both State and Commonwealth authorities in undertaking AIP arrangements;
- b) establishing the practice of having the AIP arrangements negotiated at the same time as the Environment Impact Statement stage of project development;
- c) establishing the practice of “contestability assessments” being undertaken to determine the priorities for AIP; and
- d) examining the resources and capabilities required for public sector agencies tasked with the design and implementation of AIP arrangements to ensure the relevant skills set and private sector procurement experience is embedded within the responsible agencies, or contracted in on an “as required” basis.

24. 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. In line with government policy to award a greater share of government procurement contracts to small businesses, contracts to small and medium local suppliers for goods and services will, where applicable, be maximised. 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 etc. The use of a variety of suppliers will not only provide for ongoing competition but will also ensure that smaller, local businesses are supported. 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 will be given to those contractors who include the use of such local providers.
25. Government procurement should support opportunities for small to medium sized enterprises to supply Australian and New Zealand content in all goods and services procured. Accordingly departments and agencies must be required to purchase goods from Australian and New Zealand suppliers who are price and quality competitive and who comply with the terms of this policy. Favourable consideration will be given to the tenderer who maximises employment of Australian and New Zealand citizens and permanent residents. All levels of Government should immediately 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 will not be allowed to subsequently offshore that work during the life of the contract.
26. 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 will be afforded to stakeholders to verify such compliance via the consultative mechanisms referred to in item 32 below.
27. Contracts which aggregate to in excess of \$50million per annum are of national significance. Where such contracts are for services or goods and material provided predominantly from offshore, successful tenderers must comply with additional obligations. Tenderers should be required to submit a local content plan that has been assessed by the Industry Capability Network (ICN) prior to the contract being awarded. Wherever practicable, 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 would include:
 - a) local skill development including investment in training for higher level broad based qualifications and retraining of existing workers;

- b) effective labour market planning and forecasting;
- c) the use of skilled migration only where a genuine skills shortage has been demonstrated to exist; and
- d) the use of temporary resident labour only where Australian resident workers are not available.

28. 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.
29. The federal 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).

Demand Side Procurement Policies

30. Government at all levels should examine and implement demand side procurement policy tools to promote the use of Australian goods and services and to promote innovation. In particular governments should:
- a) ensure Australian standards are applied to all procurement and are required to be applied on all projects that have AIPs;
 - b) investigate targeted demand subsidies to drive innovation;
 - c) consider the use of regulations to mandate products or a product mix designed to maximise local content; and
 - d) ensure strong local content procurement policies on all social and community infrastructure projects.

Trainees and Apprenticeships

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

Aboriginal and Torres Strait Islander Employment

32. Congress congratulates the Federal Government on reinforcing their commitment to Aboriginal and Torres Strait Islander employment by implementing the Commonwealth Procurement Guidelines and the Indigenous Opportunities Policy. The Commonwealth Government will reinforce their commitment by ensuring the

effective implementation and transparency in reporting accountabilities against the Indigenous Opportunities Policy.

Consultation

33. The government should use existing tripartite consultative mechanisms, and create new ones as appropriate, to enable stakeholders to regularly monitor the effective implementation and compliance with this policy and to suggest modifications where necessary.

International Labour Standards

34. 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 emphasises 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.

Attachment A – Outworkers

1. In addition to compliance with the instruments and legislation set out in clause 1 of the Procurement Policy, 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 must 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.
2. 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:
 - a) the name of the relevant award or workplace agreement (howsoever described) or other relevant employment law;
 - b) registration number of factory or workshop, where applicable;
 - c) registration number as an employer giving out work, where applicable;
 - d) whether outworkers have previously been engaged;
 - e) 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 lodgement of periodic work lists of employers and other parties to whom work has been given, where applicable;
 - f) evidence of workers' compensation insurance such as a renewal notice;
 - g) evidence of current superannuation fund membership and contributions;
 - h) location of time book, sheet or records required to be maintained under the applicable award and industrial legislation or other relevant employment law.
3. Unless the statutory declaration and information is provided, a tender will not be considered.
4. Where a tenderer tenders to provide goods to government that could be made by an outworker the government will notify the Textile Clothing and Footwear Union of Australia ('TCFUA') and will consult with the TCFUA about the compliance of the tenderer with industrial instruments outlined in clause 1 of the Procurement Policy and clause 1 of Attachment A of the Procurement Policy. If such a tenderer is successful in its bid to supply goods to the government, the government will notify the TCFUA.