

## **AMWU Supplementary Submission**

This submission, made at the request of the Chair and other Committee members will respond to the questions taken on notice and reflect broadly on the issues raised during the evidence of the AMWU to the Committee.

Given the focus on our international obligations in questioning by the Chair, this submission will begin with a discussion of the AMWU's view on how they interact with the AMWU's goal of achieving 100% local procurement. We will then discuss the implication that it has for specific changes to the CPRs. The submission will finish with the responses to a few stand alone questions asked by the Chair and other members of the committee.

### International Obligations

The AMWU believes that the government can achieve 100% local content from procurement in the medium term, while adhering to its current trade agreements.

To demonstrate our points, the following discussion will focus on the US Free Trade Agreement (USFTA) as it was raised specifically at the hearing.

### Exemptions

Before we look at what Chapter 15 (Government Procurement) of the AUSFTA applies to, it is important to be specific about what is excluded from its operation.

It does not apply to any scheme the government may have to preference small and medium enterprises:

#### **Section 7: General Notes**

Unless otherwise specified herein, the following General Notes in each Party's Schedule apply without exception to this Chapter, including to all sections of this Annex.

Schedule of Australia

This Chapter does not apply to:

**(a) any form of preference to benefit small and medium enterprises;**

(b) measures to protect national treasures of artistic, historic, or archaeological value;

(c) measures for the health and welfare of indigenous people; and

(d) measures for the economic and social advancement of indigenous people.

This exemption provides the government with the ability to develop a program that explicitly limits tenderers in some instances to Australian SMEs. This can and should be used to develop existing businesses and to encourage new businesses to grow and deliver goods and services that government needs.

There should be a focus on goods and services which the government currently acquires off-shore. This will assist the government to reach a medium term goal of 100% local procurement, while remaining in line with our international obligations.

There are also exemptions for defence procurement and “essential supplies.”

### **3. Coverage**

The Chapter applies only to procurements by entities listed in the annexes with a value equal to or above certain thresholds. Annex 15-A lists 79 US Federal Departments including the new Department of Homeland Security. Subsidiary agencies of the US listed entities are covered unless specifically excluded.

Australia's list in Annex 15-A includes all Federal Departments and all other agencies covered by the Financial Management and Accountability Act 1997. In addition, Australia has listed in Annex 15-B, 33 entities covered by the Commonwealth Authorities and Companies Act 1997.

**The US and Australian Departments of Defence are listed in Annex 15-A. Both sides have exempted procurement of items that are critical to their national security such as military equipment, systems and essential supplies.** Australia has also reserved the right to maintain the Australian Industry Involvement Program for defence procurement.

The Australian government should ensure that it has properly assessed which goods and services should be considered essential supplies. The AMWU believes that the government has taken too narrow a view on the types of industries which should be considered essential in our national interest. A full review should be undertaken to ensure that this exemption is being fully and appropriately utilised.

### AUSFTA – Government Procurement

Clause 15 of the AUSFTA relates to government procurement. The section which causes the most concern for Australian procurement officials is clause 15.2 which states that:

#### **National Treatment and Non-Discrimination**

1. Each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, **treatment no less favourable**

**than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.**

2. A procuring entity of a Party may not:

(a) treat a locally established supplier less favourably than other locally established suppliers on the basis of degree of foreign affiliation or ownership; nor

(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

This sets out that the government must treat companies from the US no less favorably than any Australian company. This section must be read in conjunction with the rest of Chapter 15 to understand the other discretion that government's can use when making decisions on procurement under the AUSFTA.

Section 15.9 sets out how contracts are to be awarded:

5. A procuring entity may not consider a tender for award unless, at the time of opening, the tender conforms to the essential requirements of all notices issued during the course of a covered procurement or tender documentation.

6. Unless a procuring entity determines that it is not in the public interest to award a contract, **it shall award a contract to the supplier** that the entity has determined satisfies the conditions for participation and is fully capable of undertaking the contract and **whose tender is determined to be the lowest price, the best value, or the most advantageous, in accordance with the essential requirements and evaluation criteria** specified in the notices and tender documentation.

7. A procuring entity may not cancel a covered procurement, nor terminate or modify awarded contracts so as to circumvent the requirements of this Chapter.

This gives the Australian government significant leeway in the way that it sets out its evaluation criteria and how it defines the concept of "best value."

#### Defining Best Value for government procurement

The AMWU believes that the current CPRs do not take advantage of the ability of the government to explicitly define best value to include the other benefits that flow from government procurement decisions.

A proper understanding of the value to the Australian economy of purchasing goods produced and services delivered locally, against those procured from off-shore, would allow the government to transparently and openly provide weightings to locally produced goods and services.

The economic benefits that flow directly to government through higher taxes and lower welfare spending, and indirectly through higher skills, improved labour and capital productivity and the spill over effects for the wider economy, should form part of any government decision on which proposal provides “best value.”

For example, a contract for the provision of office paper to the Australian government could include a weighting of 15% on material costs for any bidder who will provide paper made in Australia and 10% for service costs, where the staff providing those services were located in Australia.

In this scenario, all bidders will be treated equally. Australian firms are welcome to bid with imported paper and off-shore service support, and any American firm is welcome to bid with domestically-sourced paper and to open an Australian service support centre. All bidders know the evaluation criteria in advance and all parties understand what the Australian government believes will deliver best value when it does its calculations and the reasons for those decisions.

The weightings could be fixed for lower value tenders (to make things easy), but additional weight could be added for larger projects, given the value of establishing or maintaining local industries, developing skills and ensuring sovereign capabilities to deliver vital goods and services.

#### Justification for overseas procured items

To further improve the culture around the selection of tenders, procurement officials should be required to provide a reviewable justification when they select goods or services procured from off-shore over those provided locally. This should be provided to the Industry Participation Advocate (discussed in more detail later) before contracts are awarded to ensure that the Australian tender(s) has been properly assessed. There may be very limited occasions when this is the best value outcome from a tendering process, but it should not be the “easy option” for officials to select.

This process will also allow government to highlight those areas where the local industry is unable to provide goods or services that government needs. This should be passed on to an Industry Participation Advocate to allow them to identify Australian businesses that may be able to diversify into this area. It would also allow future tenders to be quarantined for Australian SMEs to help grow a local capacity.

This holistic approach to government procurement will allow government to achieve 100% local content over the medium term, while adhering to our

international obligations. It will reward investment in jobs and skills in Australia by recognising and appropriately weighting the contribution that government spending makes to the Australian economy.

#### Changes to existing guidelines

The AMWU notes that the ACTU and CFMEU/TCFUA have made submissions that propose detailed changes to a number of clauses in the current CPRs and the AMWU endorses those submissions. In light of those submissions, we make the following suggestions for consideration by the Committee.

The AMWU believes that the CPRs would be improved by setting out specifically what purchasing officials must do in order to deliver an outcome which provides best value to the Australian government, economy and community. They should provide support for purchasing officials to assist them to make simple decisions that take into account the full benefits of purchasing locally made goods and locally delivered services.

The current overarching principles set out in clause 10.30 are too vague and do not provide enough assistance to officials to make the often difficult calculations about which tender provides best value.

This difficulty is compounded by clause 10.31 which serves no useful purpose. It does not inform purchasing officials about what specific requirements are placed on their decision making by the “relevant national and international agreements” to which it refers. This clause seems to have been included for the sole purpose of undermining clause 10.30.

The argument made in our original submission is that our international obligations are poorly understood. We argued that they are generally considered by purchasing officers to be much more restrictive on our ability to preference locally made goods and locally delivered services than is actually the case. By reminding officials of these requirements, without setting out detailed instructions on how the government expects them to be implemented, clause 10.31 simply reinforces the existing bias towards purchasing the lowest cost goods and services.

The AMWU recommends that clause 10.31 be deleted and replaced with additional information in published guidelines that sets out how best value is to be understood and calculated by purchasing officials in line with our treaty obligations.

The AMWU recommends that clause 10.30 be amended as follows:

10.30 In addition to the considerations at paragraph 4.4, in order to ensure that the Australian government is getting best value for *procurements* under \$1 million Commonwealth *officials* are required to provide the appropriate weighting for work undertaken in Australia set out in table X. For *procurements* over \$1 million, to ensure that the Australian government is

getting best value, a separate investigation must be undertaken to evaluate if any additional weighting should be added for work undertaken in Australia due to the economic benefit of the *procurement* to the Australian economy, industry or skill development.

#### Existing government procurement models

The AMWU believes that the Committee could learn from the approach to procurement taken by the South Australian and Victorian governments. There is an extensive review of the success of the Victorian model in the ACTU submission and the AMWU commends it to the committee.

Furthermore, the AMWU supports any efforts to assist Australian businesses to participate in major projects and to tender for government procurement projects. The current system can be confusing to new entrants and many Australian manufacturing firms have untapped skills, equipment and expertise that could be better utilised if it was connected with international and government customers. South Australia's Industry Participation Advocate is a model that should be investigated by the Commonwealth.

#### Australian Industry Participation Plans

The objective of the Australian Industry Participation Plans (AIPs) are to require proponents to:

- 1) demonstrate how full, fair and reasonable opportunity will be provided to Australian businesses to supply goods and services to a project; and
- 2) detail the supply of key goods or services for a facility's initial operational phase, if the project involves establishing a new facility.

The AMWU believes that requiring proponents of major projects to undertake these tasks will help to increase the number of Australian businesses and workers engaged on these projects.

As such, the AMWU has submitted that the definition of Major Project under the Australian Jobs Act 2013 be reduced from \$500 million to \$50 million. This will ensure that a greater number of proponents will need to demonstrate how Australian businesses have been given a full, fair and reasonable opportunity to supply goods and services on their project.

By requiring a greater number of companies to show that they are giving Australian businesses and workers a fair go, AIPs may help to drive a cultural change in the private sector. Anything the government can do, especially something with a little cost as AIPs, to drive a "local first" culture when it comes to purchasing goods and services by the private sector will lead to more jobs in Australia.

In relation to the requirement that companies bidding for Australian government tenders valued at over \$20 million complete an AIP, the AMWU recommends that this be reduced to \$10m.

Furthermore, the requirement to engage local suppliers of goods and services for all government tenders should be required as part of all standard tendering practice, rather than just those subject to an AIP. A change of this nature would help to drive the change in culture that the AMWU believes is necessary as outlined in our previous submission.

Appendix 3 of the CFMEU/TCFUA submission includes a lengthy analysis of AIPs and the AMWU commends it to the committee.

### Australian Standards

The current CPRs and guidelines leave it to the procurement official to determine whether an Australian Standard applies and the nature of the evidence that must be supplied by the tenderers of their ability to meet that standard.

This falls well short of the systematic and mandatory application of Australian Standards to all government procurement which the Australian community expects. If an Australian Standard exists, it should apply.

It is not reasonable for the government to place a complex requirement in the hands of procurement officials without the necessary support. Especially in the context of the guidelines allowing clause 10.10 to be applied at the discretion of the procurement official, this is unlikely to make any impact on existing procurement practices.

The government should require tenderers to name all relevant standards that apply and declare that they are compliant with them. This should be monitored by an independent authority with the relevant skills to certify those claims. It is also important to ensure that management strategies are developed for high risk procurements to ensure that this new requirement achieves the changes that are required.

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