

### IMPLICATIONS OF THE AUSTRALIA–US FREE TRADE AGREEMENT REGARDING TENDER PROCESSES

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#### BACKGROUND

The Australia–United States Free Trade Agreement (USFTA) commenced on 1 January 2005 and is binding on both federal and state governments. The agreement specifies new standards for government procurement and tender processes. The NSW government, and its relevant departments, are all named within the agreement. In short, the agreement aims to ensure that government procurement is conducted with transparency and certainty, such that there are now obligations on government departments to rigidly adhere to tender evaluation procedures that have been advertised to prospective tenderers.

#### TENDER PROCESSES IN AUSTRALIA

Traditionally, government tender processes in Australia have been conducted in a somewhat 'loose' manner such that the government department would retain maximum discretion in selecting a successful tenderer. This was particularly the case in NSW where no legislation regulated their conduct. The landmark decision of *Hughes Aircraft Systems International v Airservices Australia* (1997) held that a contract could arise in the tender process such that failure to conduct a tender in accordance with a pre-advertised tender criterion could result in contractual breaches. Furthermore, each tender process contract would include an implied term of 'good faith' and 'fairness'. In reaction to this decision, government has subsequently tried to ensure that tender documents and processes do not give rise to a 'tender process contract'. Many invitations to tender include clauses that either specifically exclude the possibility of a contract arising, or state

that government is 'under no obligation to accept the lowest tender, or any tender'.

Following the Hughes case, the concept of a 'tender process contract' has been widely-accepted in foreign jurisdictions as well as approved judicially within Commonwealth and State jurisdictions.

#### RECENT CASE LAW

The Hughes decision paved the way for disgruntled tenderers to challenge a tender process. Since then, there have been several attempts in Australia and New Zealand which have argued for the existence of a tender process contract. Each of the leading cases either failed to incorporate sufficient terms to establish a breach or were unable to establish a breach of 'good faith' or 'fairness' (see for example *Pratt Contractors Ltd v Transit New Zealand*, *Cubic Transportation Systems Inc v New South Wales*, and *Dockpride Pty Ltd v Subiaco Redevelopment Authority*). Another issue raised in the Pratt Contractors case was the possibility of incorporating the terms of the government department's procurement code of conduct. In that case however, the relevant codes were not expressly incorporated. This could be a potentially successful argument in the future given that such codes of conduct may contain mandatory language unlike the tender documents themselves.

#### US FREE TRADE AGREEMENT

Chapter 15 of the USFTA concerns 'Government Procurement'. Surprisingly, the USFTA is also binding on state governments named as specific parties. This extends to obligations being placed on every Australian state and many US states, with implications for each state governments' departments.

Relevantly, 15.2 prescribes for the removal of any barriers which give rise to national discrimination; 15.6 prescribes that tendering criteria must be clearly advertised; 15.4 prescribes that government procurements should be widely advertised; and most importantly, 15.9 prescribes that:

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 notice and tender documentation.

Finally, 15.11 prescribes that parties to the USFTA must implement a independent review system for tender processes.

The effect of these clauses, according to a NSW Treasury Circular dated 22 December 2004, is that existing government department procurement practices will have to be amended. Traditional 'loose' tendering processes will have to be discontinued. Further, the USFTA provides that bidders must be told clearly what selection criteria will be used and mandates a tender challenge procedure so that excluding a pre-award contract will be pointless. So far, only the Commonwealth appears to have amended its tendering processes in line with Chapter 15. A key reason for this is the Commonwealth's actual legislative implementation of the USFTA. In contrast to this, NSW has no legislative scheme governing tendering processes and generally has the loosest

of all Australian government tendering arrangements.

The extent of NSW's implementation is minimalist and the Treasury Circular is merely referred to in the NSW Tendering Guidelines [3]. The Guidelines are to be read together with the NSW Code of Practice Code of Practice [4] as a framework for government procurement which is expressly incorporated into tender processes. However, it would be difficult to argue that the USFTA chapter is actually incorporated into tender documents and that the majority of the language within the Guidelines is vague and aspirational rather than specific and mandatory. At this stage, it is doubtful that the USFTA is incorporated into domestic NSW law or tendering practice.

#### THE FUTURE

It is clear that for NSW government to be in compliance with its obligations under the USFTA, it will have to implement tendering processes that are accountable, certain and can be challenged effectively. Without change, the NSW government may leave itself open to legal challenge as disgruntled domestic and international tenderers seek to rely on lack of adherence to the USFTA. Continued 'loose' tender practices may be open to challenge on the grounds that their exclusion provisions are contrary to public policy. The USFTA bolsters the legislative currency of Hughes as governments will no longer be able to shy away from the implications of the decision.

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