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28 May 2009

Mr J Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ewwr.sen@aph.gov.au

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Assistant National Secretary
Greg McLean

Dear John,

**Re: Inquiry into the DEEWR Tender Process to Award Employment
Services Contracts**

Attached is a Submission from the Australian Services Union to the Committee's
Inquiry into the above Bill.

The Submission is made on behalf of the National Union.

Yours faithfully

Paul Slape
NATIONAL SECRETARY

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Submission
To
**Senate Education, Employment and Workplace
Relations**

**Inquiry into the DEEWR Tender
Process to Award Employment
Services Contracts**

Submitter: Paul Slape
National Secretary

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28th May 2009

Introduction

1. The Australian Services Union (ASU) is one of Australia's largest Unions, representing approximately 120,000 employees.
2. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare, information technology workers and transport workers.
3. Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:
 - Local government (both blue and white collar employment)
 - Social and community services, including employment services
 - Transport, including passenger air and rail transport, road, rail and air freight transport
 - Clerical and administrative employees in commerce and industry generally
 - Call centres
 - Electricity generation, transmission and distribution
 - Water industry
 - Higher education (Queensland and South Australia)
4. The ASU has members in every State and Territory of Australia, as well as in most regional centres as well.
5. The ASU has members who work in providers to the Job Network and other employment services like JPET, Personal Support Program and Community Work Coordination funded by the Commonwealth. ASU members work for both successful and unsuccessful tenderers for service provision under the new Job Services Australia services due to commence on 1st July 2009.
6. The submission is authorised by the National Secretary of the Union.

Job Services Australia – Generally

7. The ASU does not take issue with the underpinning policy position for employment services that is the basis for the new Job Services Australia (JSA) system that is soon to commence.
8. We believe there is room for improvement in how new policies can be implemented in particular when providers who are outside the government in the not for profit and for profit sector are involved and when there is a changeover in the providers of the services. The concern of the ASU is for the staff of the providers who lose contracts. We believe these staff must be given preference of employment with new providers and they should not lose continuity of service or entitlements if a new provider takes over their old employer's business.
9. We also note that a number of not for profit providers cross subsidised other community services programs and we note that there is an unintended knock-on effect to these services as a result of the loss of JSA contracts, which sees employees outside the employment services adversely effected by the JSA decisions.

Securing Effected Staff

10. Effective and quality employment services depend on skilled staff. In any change of providers a primary aim must be to retain as many staff as possible at the new providers.
11. The ASU believes that in any future tender process this could be achieved in a number of ways, including providing in the new service providers' contracts Key Performance Indicators around the recruitment of staff from unsuccessful existing providers. Such a measure would be an incentive to new providers to ensure displaced staff are unaffected by a change of provider.
12. The ASU is attracted to the Executive Order of US President Barack Obama of 30th January 2009 (which is Attachment A) which details that administration's view overtly expressed that "The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees". The Executive Order details how this can be affected in service contracts with new providers. While much of the Order deals with the US circumstance and there are some exclusions we would not support (e.g. managerial and supervisory positions), the tenor of the principle of "first refusal" for employees has some attraction,

particularly when coupled with the other issues raised later in this submission. We urge the Government to consider such measures for future contracts.

13. The efficiency of ensuring existing staff carry on their employment from both the service provision standpoint and from an employee's position is self evident. Clients suffer little disruption and continuity of employment continues as does pay conditions and recognition of service.
14. Under the current system displaced Job Network employees have received redundancy pay. Eliminating redundancy pay must save the government money.
15. In the current transition to JSA a number of ASU members have complained about their employers trying to avoid their responsibilities for the payment of redundancy pay by trying to get employees to resign rather than paying redundancy pay. This has occurred in circumstances in particular where providers have not been able to absorb displaced staff in their own organisation and they seek to hinder displaced staff from commencing employment with new providers. There are losing providers who despite losing all their contracts in a State still refuse to give staff notice of impending redundancy. This has occurred for no other reason than to force resignations and avoid redundancy payments. A more streamlined transition of employees to new providers could eliminate this problem.
16. A number of our members too have reported significant cuts in salary from their old employer to their new employer. Drops in salary of up to \$5,000 per annum are not uncommon and are justified by new employers on the basis that a new employee has to start at the bottom again. This is unfair for experienced staff who but for the loss of a tender by their former employer would have not had to suffer such a loss. In some cases we believe some new employers are exploiting the situation that displaced employment services workers find themselves in. Such practices are not conducive to the retention of skilled and experienced staff in employment services and could be avoided if preference to previous staff was implemented and existing contracts of employment honoured.
17. We believe that the position has been exacerbated because the WorkChoices regime still exists and also because the employment services sector has not engaged significantly in enterprise bargaining. Many of these problems may be eliminated under the Government's Fair Work Act but we believe that intervention by the Government in the manner proposed above is nonetheless desirable.

18. It is also worth noting that the current processes mean that staff start at the beginning again for the accrual of long service leave entitlements. The ASU has long been calling for a portable long service leave scheme for workers in the social and community and employment services industry as the competitive tendering features of much of the government community services work means that while workers can have many years of experience in the industry the vagaries of the contracts and the changes in their employers can mean they never qualify for long service leave. We believe the Federal Government should implement a portable long service leave scheme for all employment services employees.

Other Recommendations

19. The ASU believes that it is important for workers in the unsuccessful services to understand why their services have lost contracts both now and in the future, so that quality service provision can be maintained.
20. We also believe a tripartite body comprised of government, employers and the union should be established to oversee current and future changes. We understand Minister O'Connor is proposing such a group be set up to assist in the process of midterm review. We welcome this development.
21. The ASU is also happy to work with the government to establish a set of principles for future changes to the system that protect jobs, retain skilled staff and promote quality service delivery. If this occurs we believe many of the concerns of our members can be eliminated.

Friday, January 30th, 2009 at 12:00 am

EXECUTIVE ORDER Nondisplacement of Qualified Workers Under Service Contracts

For Immediate Release

January 30, 2009

EXECUTIVE ORDER

NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

When a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor or its subcontractors often hires the majority of the predecessor's employees. On some occasions, however, a successor contractor or its subcontractors hires a new work force, thus displacing the predecessor's employees.

The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.

Sec. 2. Definitions.

(a) "Service contract" or "contract" means any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 et seq., and its implementing regulations.

(b) "Employee" means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

Sec. 3. Exclusions. This order shall not apply to:

(a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403;

(b) contracts or subcontracts awarded pursuant to the Javits–Wagner–O'Day Act, 41 U.S.C. 46–48c;

(c) guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103–329;

(d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph–Sheppard Act, 20 U.S.C. 107; or

(e) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

Sec. 4. Authority to Exempt Contracts. If the head of a contracting department or agency finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of this order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.

Sec. 5. Contract Clause. The following contract clause shall be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location:

"NONDISPLACEMENT OF QUALIFIED WORKERS

"(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

"(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 357(b), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

"(c) In accordance with Federal Acquisition Regulation 52.222-41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

"(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order (No.) _____, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

"(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph 5(c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States."

Sec. 6. Enforcement. (a) The Secretary of Labor (Secretary) is responsible for investigating and obtaining compliance with this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause prescribed by section 5 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this order, to the extent permitted by law, to implement the requirements of this order. The Federal Acquisition Regulatory Council shall issue, within 180 days of the date of this order, to the extent permitted by law, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this order.

Sec. 7. Revocation. Executive Order 13204 of February 17, 2001, is revoked.

Sec. 8. Severability. If any provision of this order, or the application of such provision or amendment to any person or

circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 9. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. This order is not intended, however, to preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Sec. 10. Effective Date. This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the Federal Acquisition Regulatory Council under section 6(b) of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.