



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
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Submission Cover Sheet

Inquiry into Government Procurement (Secure Local
Jobs) Amendment Bill 2018

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Inquiry into Procurement (Secure Local Jobs) Amendment Bill 2018

The Master Builders Association of the ACT (**Master Builders**) thanks the Committee for the opportunity to make a submission regarding the draft *Government Procurement (Secure Local Jobs) Amendment Bill 2018 (the Bill)*. In addition to the Bill, we note the following draft documents have been released by the ACT Government (**the Package**):

- *Government Procurement (Secure Local Jobs) Amendment Regulation 2018*
- ACT Secure Local Jobs Code
- Model contract terms and conditions

Master Builders welcomes the ACT Government's commitment to use its purchasing power to ensure that it is only contracting with contractors who have high ethical and labour standards. Master Builders supports the objectives of the Package and welcomes greater transparency in procurement and the streamlining of associated processes. However, Master Builders have significant concerns about the proposed operation of the Package and the adverse and unintended consequences for local jobs and local businesses flowing from the Package. Those concerns can be summarised into three categories:

1. Increase in red tape that will have a detrimental effect on local businesses (and local jobs) throughout the ACT;
2. Impact on the cost of construction and other services in the ACT; and
3. Conflict with Federal Legislation, including but not limited to the *Fair Work Act 2009* and the *Code for the Tendering and Performance of Building Work 2016 (the Building Code)*.

Those concerns are outlined in further detail below.

In addition, Master Builders is concerned about the initial commencement date of the Package, being 15 January 2019. Master Builders understands that the Committee is due to report to the Legislative Assembly on the Bill by 30 September 2018. The Bill could be passed in the sittings commencing 23 October 2018, at the earliest. This leaves only two (2) months before the Christmas shutdown period for the Secure Local Jobs Code Registrar to be recruited and appointed, auditor(s) to be considered and appointed by the Registrar (noting there are currently 24 auditors approved to conduct *Industrial Relations & Employment Obligations (IRE)* audits), and potential contractors to make an application for a secure local jobs certificate (noting there are currently more than 1,500 contractors in the construction industry alone that hold IRE certificates).

Regardless of the content of the Package, it is imperative that prior to commencement of the Code there is further and extensive consultation with industry relating to the practical implementation of the Code. Whilst the Code may be promoted as securing local jobs, the local business owners in the ACT are ultimately responsible for adopting the new legislative requirements and ensuring that their business, and subcontractors, are compliant with the Code. To ensure the highest level of compliance and understanding about the Code, we strongly recommend to the ACT Government that the commencement date be extended, transitional provisions be drafted, and that educational programs become the priority, as per section 22W(1)(b) of the Bill.

About Master Builders

Master Builders is the peak industry body representing Canberra's building and construction industry. Our members are predominantly small businesses and collectively undertake a significant portion of ACT Government construction work.

The building and construction industry is a significant contributor to the ACT economy, employing around 14,000 people (*ABS, August 2016*) and was recognized by the Chief Minister in the 2018-19 ACT Budget as the fourth highest industry in the ACT, making a significant contribution to the ACT economy each year. The proposed Bill and Package (in its current form) will apply to all construction contracts entered into with the ACT Government, regardless of the value.

Increase in Red Tape

One of the biggest impediments to business success is an increase in unnecessary bureaucracy, rules, and regulations. The implementation of the Package will see a dramatic increase in red tape that must be complied with to even submit a tender for ACT Government work. We consider that this is counter-intuitive and will ultimately stifle productivity and profitability in the ACT. If the Package is implemented in its current form, a building and construction business who performs both ACT and Commonwealth Government funded work (which includes projects with the ACT Government such as schools and hospitals) will be required to do the following:

Secure Local Jobs Code

- Apply for a secure local jobs certificate, and undertake an Audit as part of that application
- Submit a Labour Relations, Training and Workplace Equity Plan (LRTWEP) (except for construction projects with a contract value less than \$25,000)

Existing ACT Government Requirements

- Maintain an IRE (Industrial Relations & Employment Obligations) Certificate
- Comply with a Local Industry Participation Policy (LIPP)
- Maintain annual ACT Government pre-qualification (which consider quality, environment, safety, and financial assessment)
- Participate in active certification audits (every 13 weeks)

Commonwealth Government Requirements

- Maintain certification with the 2016 Building Code
- Submit a Workplace Relations Management Plan (WRMP)

We understand that the IRE regime will ultimately be phased out, however, there are several existing ACT Government contracts that will not be completed for some time that will require contractors to hold a current IRE certificate. This is also the case for ACT Government panels. Whilst all schemes and regimes require similar information, nuances exist which prevent a contractor from merely copying and pasting the information from one form to another. The ACT Government is yet to release the proposed form for the LRTWEP and we consider this should be progressed as a priority.

The multiple audits and plans that will be expected of building and construction businesses are excessive and will ultimately increase compliance costs. Master Builders is concerned that the increase in compliance costs will result in small to medium businesses in the ACT (of which the majority of our members identify as), deciding that they are unable to economically compete for ACT Government work. This will ultimately result in a decreased pool of contractors and potentially, interstate contractors who rarely employ local workers. These potential outcomes run counter to the objective of other Government policies, most notably the Local Industry Participation Policy.

Of further concern is that the onus is on a contractor to prove that an inconsistency exists between ACT and Commonwealth legislation. The Package presumes that all contractors firstly are aware of the incoming legislation, but secondly, that they understand there may be inconsistencies and that there is a way in which the inconsistencies can be resolved. Most contractors in the ACT do not have inhouse legal, contract, or industrial relations advisors. They rely on advice from legal representatives and industry associations but often do not engage until a problem has arisen, due to cost constraints. Master Builders is concerned about a wide interpretation of section 12(1)(b) which may see contractors required to comply with applicable orders, decisions and directions of any court in relation to the interpretation of the Prescribed Legislation, which is a lengthy list.

Master Builders intends to educate our members as much as possible regarding these requirements, however, more work should be done by the ACT Government prior to the legislation commencing, including:

- Producing detailed written material providing guidance to local businesses on the new Secure Local Jobs Code obligations,
- Holding multiple public information sessions to educate any business on the new Secure Local Jobs Code obligations, and
- Making Directorate staff available to present at industry association member education events.

Cost of Infrastructure

In addition to an increase in red tape and ultimately an increase in the cost base and expenses for contractors undertaking work on an ACT Government contract, Master Builders is of the view that the cost of infrastructure in the ACT will rise. This conclusion is based on several factors:

- Reduction of available contractors: As a result of the increased red tape associated with tendering for ACT Government contracts, as well as the numerous conflicts with the 2016 Building Code, we consider that the number of contractors willing or eligible to perform ACT Government work will reduce. This will ultimately reduce competition and the cost of infrastructure will increase in the ACT, impacting on taxpayers. A number of our

members have advised Master Builders that the introduction of the Package is likely to see them have to choose between being eligible for ACT Government or Commonwealth Government funded work. This is not a desirable outcome.

- Third-party involvement in procurement: It is our view that the operation of the Memorandum of Understanding between the ACT Government and Unions ACT (**MoU**) significantly hinders the ability of the ACT Government to achieve the necessary transparency in terms of procurement practices. Whilst we understand that the MoU is set to be abolished upon the commencement of the Package, the ongoing third-party involvement through the Secure Local Jobs Code Advisory Council legislates that third-party involvement.
- Increased Obligations of Contractors: If the Package is legislated in its current form, contractors will have further obligations to facilitate meetings of employees who are eligible to become members of Eligible Union(s) (as defined) and are required to provide information about the Eligible Union(s) and application forms to employees. Presumably, contractors will also need to keep detailed records of the steps they have taken in this regard to ensure that they are not subject to claims of non-compliance. The draft Code mandates induction training, however does not specify whether this training would need to be accredited, nor does it identify or consider the likely cost. Ultimately, the increased obligations of contractors will result in an amount being factored in to tender prices to account for this increase.
- Increased direct compliance costs: The package will also require an increase in direct compliance costs, including as a minimum, the cost of audits, administrative fees to obtain a Code Certificate and IRE Certificate, and costs of preparing the LRTWEP.

Conflict with Federal Legislation

Members of Master Builders are predominantly small businesses. Many of them rely upon construction contracts with the ACT Government, or as a subcontractor working on an ACT Government construction site, as a source of ongoing financial viability. The Commonwealth Government is also a key client for many of our members. It is not uncommon for them to undertake building work on sites funded directly or indirectly by the Commonwealth, either concurrently or in between ACT Government funded building work. Consequently, the relationship between the Package and the existing Building Code is of high concern to our members. It should be noted that the majority of hospitals and schools in the ACT also receive Commonwealth Government funding, so compliance with the Building Code is required.

Numerous conflicts have been identified with the proposed Package, the *Fair Work Act 2009* and the Building Code. It is Master Builder's overarching concern that the conflict with Commonwealth legislation will ultimately reduce the pool of local contractors eligible to tender for ACT Government work, which will in turn increase the cost of construction projects carried out by the ACT Government (see above). Master Builders does not envisage that this is at all the objective of the proposed Package and in fact, is the direct opposite to what the Package is seeking to achieve.

Alarming, rather than removing any sections that conflict between the Package and Commonwealth legislation, the Package provides an opportunity for a contractor to seek an

exemption from certain requirements under the Code if they consider that there is an inconsistency (and presumably, can prove that inconsistency exists to the registrar). This approach is entirely unsatisfactory to the Master Builders and its members. Putting the onus on contractors, many of whom are small businesses in the ACT and do not have access to legal representatives at their fingertips, to prove that they should be exempt from certain conditions, should be seriously reconsidered. We implore the ACT Government to obtain legal advice from the ACT Government Solicitor and to have the legislation reviewed by the Australian Building and Construction Commission (ABCC), and to remove any inconsistencies before the legislation is passed.

Summary

There are a number of sections in the Package that refer to guidelines that may be made by the Minister. It is difficult to comment on guidelines that are yet to be made public, but which will no doubt have a significant impact on members of Master Builders. We welcome further consultation with the Minister and the Department on the substance of those guidelines, and the impact that we consider those guidelines are likely to have on our members and the wider ACT community.

As outlined above, it is our view that given the legislation is unlikely to be passed (if in its current form) until at least mid-October, that it is premature and foolish to attempt a commencement date of 15 January 2019. If that date is maintained, Master Builders expects that this will be detrimental to ACT Government and procurement and infrastructure, as one of two things is likely to happen:

- (1) Government departments will release tender documents en masse in December to avoid contractors needing to have a secure local jobs certificate when submitting a tender. If this occurs, the tender documents may be incomplete resulting in tender submissions being submitted that have to guess on outcomes and factors, or, contractors will not have an opportunity to submit tender submissions for all projects they are interested in due to a lack of time.
- (2) When ACT Government tender documents are released in January, there will either be no contractors eligible to submit a tender because they are yet to be provided with a secure local jobs certificate, or, the pool of eligible contractors will be slim which may result in a poor outcome for the ACT Government.

Obviously, either of these outcomes will result in less than satisfactory outcomes to the residents of the ACT.

Master Builders requests the opportunity to attend the Committee hearings in person to present our submission to the Committee directly.

Yours sincerely,



Michael Hopkins
Chief Executive Officer