

Local Government (General) Amendment (Tenders) Regulation 2008

Better Regulation Statement

Executive summary

There are large numbers of waste workers engaged on council waste contracts across the State. The vast majority of these workers face the prospect of losing their jobs each time a council puts waste service out to tender and this occurs on a regular basis.

Each time a contract changes hands, the workforce performing work for a council faces:

- The loss of their jobs
- The loss of continuity of service; and
- The loss of any workplace agreements which have been negotiated in the course of the previous contract.

The proposed amendments to the Local Government (General) Regulation 2005 would require tenderers to answer a series of questions about their intended treatment of the existing workforce. Councils could then take those answers into consideration in their assessment of tenders.

The proposal will ensure that local councils and waste companies are more open and transparent in their consideration of the impact of tendering on waste services workers. It will also allow companies to tender for work based on quality of service and productivity improvements rather than drawing wages into competition. The proposal will provide councils with an option to ensure that experienced waste workers continue to provide high quality services to local residents.

The information required to be provided by tenderers will include:

- (a) a statement as to whether or not the proposed contractor intends to offer the existing workers employment or engagement with the contractor if the tender is accepted; and
- (b) if employment or engagement is offered – relevant details of the terms and conditions of employment or engagement that will be offered (including details of remuneration, preservation of accrued or accruing leave and other entitlements, hours of work, working conditions and rights to negotiate working conditions under the Industrial Relations Act 1996, the conduct of training with respect to industrial rights and occupational health and safety, duration of the employment or engagement and rights with respect to trade union membership).

The proposal will ensure that a council's decision to award a tender will be influenced, among other things, by the level of a tenderer's commitment to re-hire the existing workforce on pay and conditions no less than those applicable immediately prior to the change of contract.

The proposal will also ensure that tenderers are encouraged to offer employment to the existing workforce on pay and conditions no less than those applicable immediately prior to the change of contract.

According to the Parliamentary Counsel, any legislative proposal to protect the waste services workers' industrial interest to be valid, can merely require a council that calls for tenders for waste services to consider information about continued employment and other relevant matters provided by a tenderer. The proposal cannot result in forcing councils to require a tenderer to accept, as a condition of employment, existing waste services workers.

The proposal therefore provides for an adequate and appropriate level of government regulation.

The need for government intervention

A significant number of local councils outsource their collection of waste management services. This is done through a tender process in accordance with the Local Government Act 1993.

On each occasion that a contract changes hands the employees performing the work are adversely affected in a number of ways:

- Employees may have their employment terminated.
- Employees are required to re-apply for the position that they have performed for many years.

Despite their significant skill, knowledge and experience in performing the work, it is not uncommon for existing employees to be rejected by a new contractor who has been successful in a tender for a contract. The resulting loss of experience and local knowledge can lead to a lower level of service.

The terms of employment that are offered by a new employer are often different from and inferior to those provided to employees prior to the change in contract, particularly where tenderers seek to compete primarily on the basis of lowest costs. An employee is then forced to choose between re-arranging a family budget and potential unemployment.

According to the information provided by the Transport Workers' Union, in the City of Sydney, for example, the difference in wages paid by contractors has produced considerable inequity because at that time it still had two separate contracts for the former South Sydney area and the former City of Sydney area. The waste workers in the former City of Sydney area received wages under a collective agreement which were considerably above award, while those working for a different company in the former South Sydney area received award rates for performing the very same work. As a result, the latter contractor had a high turnover of waste workers, resulting in a lack of industry knowledge and possibly lower levels of service.

To summarise, the act of awarding a waste management contract by a council to a new company often has a negative impact upon all employees of the existing

contract holder and can lead to a reduction in the level of service. The change of employment causes, among other things, a break in the continuity of employment, reducing waste services workers' access to leave entitlements.

Further, contracts for waste services management are typically for a period of 8 years. Due to a cyclical nature of those contracts, it is possible for waste services workers to do work for the same council for many years without accruing long service leave entitlements.

Under the Long Service Leave Act 1955, an employee is entitled to a pro rata long service leave payment after five years of service. If a council chooses to tender for waste services more regularly than each five years, re-employed employees do not legally accrue an entitlement despite their service to the same council over a number of years. This means that they are denied the same opportunity as afforded to workers in other industries.

The introduction of the Federal Work Choices legislation saw the waste services workers' industrial interests jeopardised even further.

All of the above results in waste services workers being forced to contemplate their financial security each time a contract is re-tendered. This is an important issue given that there are large numbers of waste services workers employed under council contracts across the State.

It is therefore considered appropriate that the ambit of the proposal is restricted to tenders for waste management services. However, in the event that Government identifies the circumstances where it will be appropriate to expand the application of the proposal to include tenders for other services, those proposals will be considered on their merit. It is noted that such an expansion is likely to broaden the range of contractors, which may include various State Government Agencies and State Owned Corporations.

Objective of the government action

The proposal is in line with the NSW Government's commitment to continue to provide a fair industrial relations system that would afford special protections to vulnerable workers, including protection from exploitative contractual arrangements.

It is considered that waste services workers constitute one of the most vulnerable industry groups due to existing tender processes and the lack of jobs available on a more permanent basis. Government legislative intervention is considered appropriate as it will improve the access of waste workers to continuity of service and leave entitlements.

Further, a number of priorities identified in the NSW State Plan that are relevant to the local government sector are particularly focused on such areas as improving services to focus on community needs and growing prosperity across NSW by focussing on financial management and strengthening the rural and regional skills base.

One of the most important and valued services provided by local councils to residents is waste management.

The proposal is consistent with the Plan as it aims at the retention and development of skilled waste service workforce in NSW. It is reasonable to expect that better protection of waste workers' industrial interests will result in lowering the turnover of waste service workers and minimise the risk of job losses. This will result in improved services to local communities.

The proposal is also consistent with the Plan in that it aims at strengthening the rural and regional skills base of waste services workers.

Assessing options for achieving the objective

Option A - amend the Local Government (General) Regulation 2005 as proposed

The amendment would improve the access of waste workers to continuity of service and leave entitlements by requiring tenderers to address a number of matters, including commitments to offer employment to existing waste services workers on no less terms and conditions that those applicable to workers immediately prior to the tender commencing services, to treat as unbroken the service of workers who accept the offer and to assume responsibility for all accrued entitlements, etc.

Council would then rank the complying tenders received against all criteria in the tender specifications and accept the most advantageous (or decline to accept any of the tenders).

If implemented, the proposal will ensure that local councils and waste companies are more open and transparent in their consideration of the impact of tendering on waste services workers. It will also allow companies to tender for work based on quality of service and productivity improvements rather than drawing wages into competition. The proposal will provide councils with an option to ensure that experienced waste workers continue to provide high quality services to local residents.

However, the amendment will not enable a council to force a tenderer to accept, as a condition of contract, existing waste services personnel and comply with other matters as referred to in the proposal.

Option B – do nothing

Councils are already in a position to include in their tender specifications the requirements that tenderers address the issues related to the employment of staff and the terms and conditions on which that staff is offered employment.

A number of councils, most notably Penrith City Council and Canterbury City Council already have policies which provide more significant protections for waste workers. Similarly, according to the Transport Workers' Union, a number of waste operators have provisions for job security contained within their collective union agreements.

It may be a matter for the TWU to work with individual councils to ensure that such requirements are included. However with 152 councils this may be problematic as it will be difficult to get all councils to agree to similar arrangements. As a result, tenderers would face additional costs as they would need to comply with varying requirements across the State.

Option C – non-regulatory options

An option of encouraging councils to enter into Memorandums of Understanding with a tenderer for waste management service to the effect that the tenderer (if successful) will ensure that the existing waste services workers will be offered employment on at least the same terms and conditions as they were previously employed by an outgoing contractor, was considered.

While it is acknowledged that some contractors may honour the terms of an MOU, it is noted that MOUs do not have legislative power and are not legally enforceable.

Also, some councils may not find the option viable on a cost assessment basis. This is because council may incur considerable expenses in preparing relevant documentation and in the conduct of negotiations with waste services companies without necessarily achieving the desired outcome.

Conclusion

It is submitted that option A is best suited to achieve the aim of the proposal, ie to protect the industrial interests of waste service workers.

The regulation will be enforced by councils entering into a contract with a successful tenderer following a proper tender process. The terms of that contract will be reflective of the information provided by the tenderer in their submissions. The terms of such contract will be legally enforceable. Council will be in a position to do so.

Costs of Option A

There will be no financial impact on the State Government flowing from the making of the Regulation, unless State Government agencies, including State Owned Corporations, tender for local councils' waste management services.

There may be minimal additional costs for tenderers for waste services management in that they will have to address in their tenders additional criteria prescribed by the Regulation. Contractors will have a choice what pay rates and entitlements to offer in their tenders.

There will be some additional direct costs to councils such as preparation of additional documentation for inclusion in tender specifications. Also, there may be more time and resources expended by councils during a selection process as additional criteria will be required to be considered and assessed.

Option B - do nothing

Costs of Option B

Larger numbers of waste workers will lose their jobs, face reduced wages and conditions and have lesser opportunities to accrue long service leave. The provision of waste services may result in lower levels of services through the loss of more experienced workers.

Option C - non-regulatory options

Significant costs will be incurred by councils in preparing MOUs and negotiating with a successful tenderer. Most likely, councils will have to engage legal practitioners to appropriately address the matters. This option is not considered effective as no legally enforceable contractual relationship may arise as a result of executing an MOU and the parties are less compelled to honour its terms.

Consultation

The Office of Industrial Relations of the Department of Commerce was informally consulted about the proposal. The Office of Industrial Relations noted that the proposed Regulation addressed only contracts for waste services rather than contracts for all types of services for which tenders are required to be issued by councils under section 55 of the Local Government Act and suggested that the broader context may be considered.

It is considered appropriate that the ambit of the Regulation is restricted to tenders for waste management services due to the highest turnover of staff within the industry.

The proposal is supported by all major stakeholders, including the Local Government Association of NSW and the TWU.

Evaluation and Review

The Regulation is subject to staged repeal no later than 1 September 2010.