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9 June 2004

NCP Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Sirs

SUBMISSION TO THE INQUIRY

Background

- **acl**'s core business is the provision of English language education and training programs.
- In 2002 a Commonwealth Department issued a Request for Tender (**RFT**) for the provision of certain services.
- **acl** submitted a tender and was successful in two of the regions for which it tendered, but was unsuccessful in a third region. A consortium headed by a New South Wales Department (**State Department**) was the successful tenderer in this region.
- The RFT required that competitive tendering and contracting involving any tenderer or associate meet the principles of competitive neutrality and a statement of compliance was required to this effect from each consortium.

acl's concerns

- **acl** considers that, in its tender, the consortium headed by the State Department may not have complied with competitive neutrality principles.
- The RFT required what is known as fully distributed pricing, however **acl** believes that the consortium headed by the State Department may have applied avoidable costing, which would have enabled it to provide a lower cost tender than **acl**. In **acl**'s view this would be in breach of the RFT requirements as well as a breach of the New South Wales competitive neutrality principles.

Commonwealth competitive neutrality complaints handling mechanism

- The RFT stated that anyone who believed that a tenderer had not applied competitive neutrality principles, or had applied them in a manner which was insufficient to remove any net competitive advantage, could lodge a formal complaint with the Commonwealth Competitive Neutrality Complaints Office (**CCNCO**).

- As a result of its concerns, **acl** initially approached the CCNCO, however the CCNCO advised **acl** that it did not have jurisdiction to hear a complaint about a State, as opposed to a Commonwealth, agency.

New South Wales competitive neutrality complaints handling mechanism

- In accordance with the New South Wales Government's competitive neutrality complaints handling mechanism, **acl** took all steps which it reasonably could to resolve the matter directly with the State Department by seeking information about the pricing of its tender.
- In the course of correspondence to **acl**, the State Department stated that it had applied the pricing methodology required by the RFT. However based on its knowledge of the services to be provided in response to the tender, **acl** considered that the matter should be investigated further. In accordance with the New South Wales complaints handling mechanism, a formal request was made to the Premier for the matter to be referred to the State Contracts Control Board or the Independent Pricing and Regulatory Tribunal for adjudication.
- After the exchange of a number of letters between **acl** and the New South Wales Cabinet Office over many months, the Cabinet Office advised that there were insufficient grounds to recommend to the Premier that the complaint be referred to further investigation. In its correspondence the Cabinet Office stated that the New South Wales competitive neutrality complaints mechanism was not established to investigate compliance with contractual requirements imposed by other jurisdictions. In other words, where a State agency failed to comply with the Commonwealth's competitive neutrality requirements the New South Wales competitive neutrality complaints mechanism could not be used to review compliance.

The failure of the competitive neutrality complaints handling mechanisms

- The effect of the application of competitive neutrality principles in a federal context - evidenced by the jurisdictional limitations of the CCNCO and the position taken by the New South Wales Cabinet Office - is that, where the Commonwealth imposes a contractual requirement on a New South Wales State agency to comply with specified competitive neutrality principles, if the State agency does not comply, neither the Commonwealth nor the State complaints handling mechanisms provide an avenue for relief for an affected party.
- In **acl**'s view, this represents a failure in the administration of the competitive neutrality policies in a federal environment and goes to the heart of the ability of small business in Australia to compete fairly with State Government agencies. It is contrary to the intent of the complementary State and Commonwealth competitive neutrality arrangements, which is co-operative federalism, with the full range of State and Commonwealth activities being governed by competitive neutrality principles.

acl would be happy to provide any other information which the Inquiry may require in order to consider this issue in greater detail.

Yours faithfully

Helen Zimmerman
Managing Director
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