

22 August 2008

Authorisation no A91084
Job Futures Ltd

Further submission to ACCC on proposed non compete arrangements between Job Futures Ltd and its members

1. Comments of ACCC in relation to non compete arrangements

1.1 In its Draft Determination of 26 June 2008 the ACCC acknowledged the benefits of the non compete arrangements outlined in its submission.

1.2 It noted that “there is some benefit from the current non compete arrangements to the extent that it underpins the operation of its co-operative model and facilitates the entry and on going operation of the smaller service providers.” (Summary, ii)

1.3 At par 6.97 the ACCC “accepts that for Job Futures to generate the benefits of its information sharing model, there is some merit in having members commit to working within the Job Futures organisation for more than one tender process/period.”

1.4 However the ACCC was of the view that the non compete arrangements had the “effect of *severely and indefinitely* discouraging members from tendering separately and in competition with Job Futures [emphasis added]” and that this is a significant public detriment. (par.6.107)

1.5 The Draft makes it clear that it is open to Job Futures to propose alternative, less restrictive arrangements in order to achieve the identified public benefits, indeed it is noted in the decision that Job Futures has been considering different options to this end.

1.6 At par 6.119 the ACCC states that

“Given the ACCC has recognised that there is benefit in Job Futures members committing to work within the collective for more than one contract period, it may be appropriate for any authorisation to cover this longer period.”

2. Development of alternative proposals for consideration

2.1 The ACCC’s concerns centre on both the length of time of the restriction and the impact of a decision on the part of the sub contractor to pull out of the arrangements. Job

Futures has discussed these concerns in its submission in response to the draft Determination.

2.2 Job Futures has developed alternative arrangements which seek to address these issues while enabling Job Futures Ltd to protect, to some degree, the ongoing sustainability of its model.

2.3 Consultation process. A draft of these arrangements was sent to all members that had expressed an interest in tendering with Job Futures on 4th July 2008. In response to member feedback they were modified by the Board and a final version sent on 17th July. Further information on the consultation process is available to the ACCC on request.

3. The proposed arrangements

The proposed arrangements are set out in detail in Attachment A. In brief, the arrangements would:

- require member organisations to commit to remaining within the arrangements for at least two full contract terms or two tenders;
- require organisations that wish to exit the arrangements after the initial term to give Job Futures Ltd notice approximately half way through the second contract term;
- entitles Job Futures Ltd to restrict an exiting organisation's access to information other than that required for it to deliver the Services;
- entitles Job Futures to allocate a small part of the contracted services to another member, provided that this does not reduce the contracted market share to an amount less than that identified by the organisation as its minimum viable share.

In order to give effect to these arrangements, Job Futures seeks an authorisation period of 8 years (noting that the new contracts would take effect from June 2009)

3.1 Longevity of the arrangements

3.1.1 The ACCC is of the view that the current arrangements have the effect of an indefinite restriction because the opportunity to tender for future contracts tends to arise during the life of an existing contract.

3.1.2 (It should be noted that this is not always the case, and Job Futures asks that the ACCC confirm its view that the current arrangements are not overly restrictive to the extent that they prevent tendering for contracts that cover the same period as the existing sub contract – eg. a sub contractor has a contract from 2005-8 would be prevented from tendering from a second contract to deliver this service outside Job Futures for 2007-8).

3.1.3 The new proposed arrangements enable an organisation to exit after two contract periods or two tenders without breaching the sub contract arrangements. The specification of the period for which an organisation is committed is somewhat difficult.

3.1.4 It is anticipated that the next employment services contract will be for an initial period of three years. However there is likely to be provision for extensions up to a total period of 9 years¹. It has been fairly common in this market for one to two year extensions to be granted to providers on top of an initial 3 year contract.

3.1.5 As set out in Job Futures supplementary submission of 16 May 2008 (especially B1, C3), the success of Job Futures model relies on new entrants being able to 'borrow' the experience and performance of existing sub contractors in the tender process. It is important that sub contractors remain in the arrangements for two **tender** periods, not just a fixed period of time, because it is at tender that the opportunity for new entrants crystallises.

3.1.6 Having said this, Job Futures acknowledges that an arrangement which provides that an organisation must tender within the arrangements in circumstances where the initial contract has already been extended to 9 years is not consistent with the principles underpinning these new arrangements.

3.1.7 Accordingly, the proposed arrangements define the initial period as the initial 3 years plus any extensions of *less than* three years. An extension of 3 years or more would be considered a subsequent period and organisations could notify an exit within this period.

3.1.8 The proposals seek to balance the acknowledged benefits of organisations remaining within the arrangements for two tenders with the desire to enable organisations to exit and tender in their own right within a reasonable timeframe.

3.2 Severity of the arrangements

3.2.1 In its draft determination, the ACCC identified a number of factors which, in its view, make the arrangements outlined too severe. These are:

- a) that an organisation might find itself in a position where, in order to avoid breaching the sub contract, it would have to stay out of the employment services market for 3 years;
- b) that an organisation might be considered to be in breach of its sub contract if it signalled an intention to tender outside Job Futures and that this could lead to cancellation of the remainder of the contract;
- c) that an organisation might be considered to be in breach of its sub contract if it signalled an intention to tender outside Job Futures and that this would harm its reputation with the purchaser;
- d) that an organisation which is not a current provider in a particular location is disadvantaged in a tender process because it is not an incumbent.

¹ The exposure draft of the new arrangements has been released and is available at www.workplace.gov.au/ESpurchasing

3.2.2 The proposed arrangements address each of these issues. An organisation would be entitled to signal its intention to tender outside the arrangements after an initial period. It would not suffer any damage to reputation as a result of breaching the sub contract. It would be able to retain its sub contract and the benefits of incumbency in the coming tender.

3.2.3 However, as Job Futures submitted in its initial response to the ACCC's draft determination on the 18th July, the sustainability of Job Futures model relies on being able to continue to transfer the value of incumbency to new entrants to the market. For this reason, Job Futures has proposed that it should be entitled, where practicable and reasonable, to allocate a small part of that contract (up to 30%) to another member organisation seeking to enter the market.

3.2.4 The proposed arrangements if they were put into effect, would protect the sub contractor from any reallocation that would render their business unviable or the Services ineffective in a number of ways:

- The right could not be exercised until the last 18 months of a contract with 60 days notice. On the basis of a 6 year contract the maximum value that could be reallocated would be less than 8% of total contract value.
- The right could not be exercised if the contracted share remaining to the sub contractor was less than that amount it specified in the initial tender process as its minimum bid in that ESA. In other words the sub contractor has already determined that this amount is viable.
- The Board is required to take account of any issues about viability or effectiveness of delivery and must not operate outside its overriding obligations to the Customer to deliver quality services. In practice this means that the Government must consent to any change.

3.2.5 While the existing sub contractor is protected, the proposed arrangements have a pro competitive value because they would enable a new entrant to come into the market with a view to competing in the next tender round. The proposed arrangements would enable Job Futures to continue to facilitate entry of new players into the market, with associated benefits to the community, purchaser and job seekers.

3.2.6 With the proposed arrangements Job Futures will be able to introduce new competitors into the market without damaging the reputation, tender chances or viability of existing sub contractors.

3.2.7 Without the proposed arrangements, Job Futures is more likely to lose the opportunity to secure a new entrant into that location because its existing sub contractor has chosen to tender alone or in partnership with another organisation and it cannot try to mitigate this loss. This is a competitive disadvantage to Job Futures when compared to other providers who could expect to use incumbency to build their presence in an area. It

diminishes Job Futures ability over the long term to facilitate entry of new providers into that location. There is a risk that Job Futures would lose the whole of the benefit of its incumbency in a region. In the tender process one of the factors that impacts on capacity to get into a new location is performance and experience in similar locations. If Job Futures had managed to secure a contract in Adelaide and its sub contractor decided to exit, it is likely to take that value of incumbency with it not only in the particular site but for any other members in the Adelaide area wishing to enter the market.

3.2.8 Without the proposed arrangements Job Futures long term viability is at risk. This would mean loss of the acknowledged benefit Job Futures provides in securing an ongoing role for smaller providers in the market.

In putting forward these revised proposals Job Futures has attempted to address the ACCC's concerns as well as providing the basis for the ongoing sustainability of the model that it has established – and the public benefit this model delivers.

The development of these arrangements has involved extensive consultation with members. After ten years of successful delivery under the current arrangements, Job Futures is, through these revised proposals, seeking to establish a foundation for continuing success in facilitating diversity in our sector while acknowledging that a more mature model means that changes need to be made. We do this in the lead up to the most competitive tender round ever with new international providers seeking to enter the market and the formation of significant domestic alliances.

Note. It should be noted that the arrangements described may require some amendments to the Membership Charter of Job Futures and it would be Job Futures intention to make any changes required at the first available opportunity following the ACCC's determination.

A PROPOSED ARRANGEMENTS

1. Initial and Subsequent Terms

1.1 The initial term of this Agreement is the term of the Principal agreement plus any extensions of less than three years offered by the Customer and accepted by Job Futures Ltd.

1.2 The subsequent term refers to a contract for delivery of the Services which immediately follows the initial period.

2. Sub contractor not to offer to supply Services on its own account

2.1 Job Futures acquires the Services from the Sub contractor on condition that the Sub contractor does not, during the initial term of the Agreement and the subsequent term of the Agreement, offer to supply or tender to supply the Services on its own individual account or through a related body corporate to:

(a) the Customer or

(b) another supplier of services to the Customer

other than with the prior written consent of Job Futures Ltd or as provided for in clause 3 below.

The Services includes all or part of the services and includes any successor program.

3. Intention to withdraw from tendering arrangements

3.1 After the end of the Initial term and no later than 18 months prior to the end of the subsequent term, the Sub contractor may give notice that it does not wish to continue to deliver the Services under Sub Contract to Job Futures beyond that term.

3.2 Job Futures Ltd, by decision of its Board, may decide to vary the date at which the notice referred to in clause 3.1 must be given by Sub contractors. In determining any such variation the Board shall take into account the anticipated timing of any request for tender and the interests of the Job Futures members both individually and collectively.

3.3 At any point after the date of receipt of this notification, Job Futures Ltd may allocate a portion of the contracted business share to another member organisation, provided that:

the sub contractor's remaining business share in an ESA is not less than that identified by the sub contractor through the tender process as its minimum bid for that ESA; and

the portion allocated to another member organisation is not more than 30% of the contracted business share; and

Job Futures Ltd provides no less than 60 days notice of the reallocation.

3.4 The exercise of any right under clause 3.3 is limited by the rights and obligations of Job Futures Ltd under the Principal contract. In making a decision to under clause 3.3 the Board must have regard to the impact of any decision on the financial viability of the sub contractor and its capacity to deliver the Services effectively.

3.5 Where Job Futures Ltd is in receipt of a notification under this clause, Job Futures Ltd may restrict access to systems, services, information and support which, in the view of Job Futures Ltd, could be used by the Sub Contractor to the detriment of Job Futures Ltd or any of its members including any discussion which relate to a future Job Futures tender. Job Futures will continue to provide such access as is necessary for the sub contractor to deliver the Services effectively.

4. Information to be used solely for the purpose of delivering the Services

4.1 Information provided to a sub contractor by Job Futures Ltd, whether directly or by providing access to Job Futures or the Customer's systems, is confidential information and is to be used solely for the purpose of delivering the Sub contract.

4.2 Where an organisation wishes to include information about their own organisation's performance as a sub contractor to Job Futures Ltd in a tender on its own account or as part of a consortium or partnership it must ensure that:

- a) it does not include any reference to the overall performance of Job Futures Ltd or the performance of any other current or previous sub contractor of Job Futures Ltd;
- b) any performance information or data included relates solely to the services sub contracted to that organisation and the period of the sub contract and does not include any data which relates to Job Futures Ltd generally or another sub contracted organisation;
- c) no information, strategies, programs or resources developed by Job Futures Ltd or other current or previous sub contractor of Job Futures Ltd are referred to or claimed by the organisation. This includes strategies contained in member plans and performance analysis provided by Job Futures Ltd;

unless the written consent of Job Futures Ltd has been first obtained.

4.3 Where a sub contractor has given notice under clause 3.1 or where in Job Futures opinion, reasonably formed, the subcontractor is in breach of clause 4.1 or clause 4.2 Job Futures Ltd may restrict the provision of confidential information to the subcontractor to that which it deems essential for the delivery of the sub contracted services.

4.4 Where a Sub contractor submits a tender to the Customer for the Services described in this sub contract, Job Futures Ltd may inspect the tender documentation submitted by the Sub contractor for those Services for the sole purpose of determining whether any Confidential information has been used.

4.5 Where Job Futures Ltd wishes to exercise its right under clause 4.4 it must give notice to the organisation within 3 months of the date at which the tender was submitted. Upon receiving a request from Job Futures Ltd, the Sub contractor must make the document available within 10 business days. The sub contractor may request that the inspection be conducted by an agreed third party.

5. Membership

5.1 The Sub contractor must remain a financial member of the company for the initial and any subsequent Term.

5.2 The Subcontractor must comply with the Constitution, the Job Futures Ltd Membership Charter and the Membership Policies of Job Futures as determined from time to time.

5.3 If the Subcontractor is not a full member of Job Futures at the Commencement Date: the Subcontractor must submit an application for full membership within 14 days of the Commencement Date; and if approved by the Board, the Subcontractor must pay any applicable membership fee (including entrance fee) by the date specified by the Board.

5.4 If the Subcontractor:

(a) is not a member of Job Futures at the Commencement Date and: does not comply with the requirements of clause 5.2; or the Board does not approve its application for full membership; or

(b) ceases to be a full member of Job Futures,

Job Futures may immediately terminate this Agreement.

5.5 Where an organisation has exercised its right to issue a notification under clause 3 the organisation's rights to participate in all activity or to receive information relating to future tenders including proposals to admit new members are suspended.

5.6 Job Futures may withhold the amount of the membership fee from contract fees where the membership fee has not been paid at the due date."