

Our ref: SKL:ITC001/9

7 May 2009

Jessica Buik  
Project Officer  
Adjudication Branch  
Australian Consumer and Competition Commission  
23 Marcus Clarke Street  
CANBERRA 2601

Dear Ms Buik

**Application for a Minor Variation of Authorisation No:A91063**

We refer to the Commission's questions regarding the Application for a Minor Variation by the Information Technology Contract and Recruitment Association (ITCRA).

We are instructed to reply in the following terms.

***1. In what circumstances do Clients change Suppliers prior to the completion of a contract?***

***Background***

- 1.1 Typically there are two components to contracts between Members of ITCRA and Clients:
  - (a) A Master contract to cover generic terms and conditions; and
  - (b) Individual (sub) contracts to cover the circumstances of each individual Contractor.
- 1.2 It is unusual for Clients to change a Master contract during the duration of the agreement. However, Individual contracts usually terminate long after the Master contract has ended. The Contractors under those Individual contracts are transitioned from the outgoing Supplier to the incoming Supplier.
- 1.3 In addition, a Member has contracts with Contractors who are deployed in the workplaces of Clients.

*Reasons for transitioning*

- 1.4 ITCRA understands that transitioning occurs for a variety of reasons, for example:
- (a) A frequent and important reason is the desire of Clients to change Suppliers to reduce their costs.
  - (b) The Supplier may be acquired by another company, making transitioning appropriate.
  - (c) A Client may consider that a Supplier is underperforming and for that reason may prefer another Supplier.

**2** *How often did Clients initiate the Contractor transitioning provisions of the Code? Please provide some examples of instances where the Contractor transitioning provisions were invoked and the outcome.*

- 2.1 Since the Authorisation of the ACCC on 27 February 2008 there has only been 2 formal complaints relating to transitioning. These have been lodged in the past 4 weeks. They are in the process of review.
- 2.2 However, ITCRA believes that the current Code of Conduct has guided the conduct of those in the industry where transitioning issues arise. In other words, issues are resolved between the parties by initial discussions without the need for a formal dispute resolution process.
- 2.3 There have been many examples of Clients consulting ITCRA on transitioning, including State Governments and the private sector.
- 2.4 ITCRA considers that most transitioning is driven by the Client and not Industry (Suppliers). The Code of Conduct in whatever form is intended as a mechanism to manage transitioning in such a way as to avoid damage to the Contractor recruitment industry.

**3** *How will the deletion of the relevant clauses regarding Contractor transitioning impact outgoing and incoming Suppliers, especially having regard to the requirement for incoming Suppliers to honour existing contracts (subclause 7.1.1)?*

- 3.1 This will depend on the circumstances of particular cases. As noted in paragraph 1.4 above there are a variety of reasons why transitioning occurs.
- 3.2 If the clauses are deleted, depending on the circumstances, incoming Suppliers may :

- (a) Charge more to cover costs of the transitioning process (This may be necessary if the incoming Supplier agrees to pay compensation to outgoing Supplier to secure the services of the existing Contractors.)
  - (b) Offer to retain the Contractor on the same or lower remuneration.
  - (c) Not proceed with the transition, that is, walk away from the opportunity with the particular Client if they cannot secure a satisfactory commercial and legal outcome.
- 3.3 ITCRA considers that the existence of subclause 7.1.1 enables Clients to practice transitioning within the framework of contractual rights.
- 3.4 The deletion of the relevant clauses will mean that outgoing Suppliers must rely on contractual rights supported by the obligation of Members under the Code of Conduct to honour contracts.
- 4 ***How will the proposed removal of the relevant clauses on Contractor transitioning impact Clients in their decision to switch Suppliers?***
  - 4.1 ITCRA considers that removing the clauses may make it more difficult for Contractor transitioning to occur.
- 5 ***How will incoming Suppliers be obliged to honour future contracts under subclause 7.1.1?***
  - 5.1 The outgoing Suppliers may raise a complaint of the incoming Supplier, which could lead to a sanction (including expulsion of the incoming Supplier) should they break the Code of Conduct.
- 6 ***Do the dispute procedures in the operational guidelines (Schedule A in the amended Code) apply in respect of contract transitioning?***
  - 6.1 Yes, this procedure may be used to process complaints by outgoing Suppliers against incoming Suppliers in the event the incoming Supplier does not satisfy its obligation under the Code to honour contracts (Clause 7.1.1).
  - 6.2 Also, if an incoming Supplier encourages a Contractor to break his or her contract with an outgoing Supplier (ITCRA Members), this might be a breach of the Code that would be processed under Schedule A in the amended Code. (Clause 7.1.2 of the Code).
  - 6.3 It is noted that the jurisdiction of Courts of competent jurisdiction is not excluded by the Code (Clause 11.2 of the Code). Thus depending on the conduct of the parties and the attitude of the relevant Court it may be that legal aspects relating to the subject matter of complaints will be resolved by the Courts.

**7     *What are the likely public benefits and public detriments from the proposed removal of subclauses 7.1.3, 7.1.4, clauses 7.2, 7.3 and Schedule A?***

- 7.1     The ACCC saw possible anti competitive effects (paragraph 5.35 of its Determination of 27 February 2008.) The proposed amendments would remove these possible concerns.

We look forward to hearing from you further.

Yours faithfully



Stephen Lucas  
Consultant  
(03) 9291 2344  
stephen.lucas@sparke.com.au