EUROPEAN UNION

DELEGATION TO AUSTRALIA

Canberra, 24 March 2017
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Inquiry into the Commonwealth Procurement Framework

(Submission from the Delegation of the European Union to Australia – 24.03.2017)

Please consider this submission as a response to the "Inquiry into new Commonwealth procurement rules" on behalf of the European Union (EU). This response takes on-board considerations in view of Australia's on-going process of accession to the WTO Government Procurement Agreement (GPA) as well as the development of the bilateral EU-Australia trade and investment relationship. Having examined the specific amendments made to the Commonwealth procurement rules more closely, we would like to express more detailed views on specific provisions.

We note that the Commonwealth Procurement Rules, "CPRs" (Section 105B (1) of the Public Governance, Performance and Accountability Act 2013) are the keystone of the Australian Government's procurement policy framework. We note that according to the CPR-provision 10.31 "*the policy operates within the context of relevant national and international agreements and procurement policies to which Australia is signatory, including free trade agreements and the Australia and New Zealand Government Procurement Agreement.*"

In view of the importance of CPRs, the EU considers that it is crucial to ensure their compatibility with Australia's existing and future international obligations. We understand that the rules are further supported by specific guidance material prepared by the Department of Finance. We have therefore examined also this guidance material.

Consequently, our main concern relates to two specific provisions, Article 10.10 on the application of standards and Article 10.30 on the examination of economic benefit. We understand that these provisions are intended to be read together with previous overarching provisions which refer for instance to non-discrimination. However, the provisions themselves as well as the guidance accompanying them raise concerns on compatibility with the GPA. Considering that Government Procurement is also one of the core areas of EU-Australia trade relationship, and that international procurement arrangements build on the core principle of National Treatment between the parties, these concerns are valid also in view of our future bilateral relationship.

More specifically, Article **10.10** provides the following: "*Where an Australian standard is applicable for goods or services being procured, tender responses must demonstrate the capability to meet the Australian standard, and contracts must contain evidence of the applicable standards*."

With respect to the application of Article 10.10 on standards, the guidance document indicates that international standards should be used when they exist and apply to the relevant procurement, except when the use of international standards would fail to meet the relevant entity's requirements or would impose greater burdens than the use of recognised Australian standards. On this basis, we understand that if an international and an Australian standard coexist, the procuring entity could still give preference to an Australian standard. The guidelines also indicate that where applying a standard (Australian, or in its

absence, international) for goods or services, relevant entities must make reasonable enquiries to determine compliance with that standard.

On this basis, it is not clear how the requirement for compliance with an Australian standard is compatible with Article X:2 (b) of the GPA which provides that: "In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate: *base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes*." It appears that under CPRs only in the absence of an Australian standard, an international standard would apply. It is furthermore not clear how contracting entities carry out "reasonable enquiries" in this context.

Article **10.30** reads as follows: "*In addition to the considerations at paragraph 4.4, for procurements above $4 million, Commonwealth officials are required to consider the economic benefit to the procurement to the Australian economy*."

In this respect, we are concerned in particular that the "*economic benefit to the Australian economy*"- test could be applied in a discriminatory manner towards EU suppliers. First of all, according to the guidelines it appears that the burden of proof to assess if and when a tender would bring benefits to the Australian economy remains with the bidder. Only direct effects to the Australian economy should be assessed. Secondly, the guidance indicates that in general terms, benefits to the Australian economy result when the procured supply:

- makes better use of *Australian resources* that would be otherwise under-utilised (e.g. employing persons who would be otherwise under- or unemployed, spare industrial capacity, or freeing government funds for other spending); or

- otherwise increases productivity (e.g. adopting new know-how or innovation, or more people acquiring in-demand skills, or allowing resources to be allocated to *sectors in which Australia has a comparative advantage*).

The guidance also contains that an increase in productivity-enhancing technology development and adoption is also relevant to economic benefit, in matters such as *transfer of technology to Australian businesses* and Indigenous workforce participation.
On the basis of the elements described above, it appears that the requirement for "economic benefit to the Australian economy" is in breach with the GPA, in particular with Article IV (1) of GPA which contains a general requirement for non-discrimination.

In light of the above concerns, we would encourage you to re-examine the provisions as well as the specific interpretative guidance in light of our observations raised above in order to align them with Australia's international obligations and the principles of the GPA.

Thank you for your consideration and if we can be of further assistance or if you have any questions regarding this submission, please do not hesitate to contact: Mr Ivano Casella Counsellor (ivano.casella@eeas.europa.eu).