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National Code of Practice for
the Construction Industry

1997

Meeting of Procurement and Construction Ministers
Australian Procurement & Construction Council Inc
National Code of Practice for the Construction Industry
Perth, 1997

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INTRODUCTION

The construction industry is an important sector of the Australian economy because of its direct contribution to the national economy and its influence on other sectors of the economy. In peak periods the industry produces almost seven per cent of Gross Domestic Product and employs nearly five per cent of the work force. The construction industry in Australia must be efficient and competitive if it is to fulfil its potential to contribute towards national economic growth.

A major share of output across all construction sectors is generated by the continuing demand for public asset and infrastructure development. This demand is generated by direct government investment and, increasingly, through joint arrangements between the public and private sector for the provision of community infrastructure.

As major clients of the industry Governments are providing leadership in effecting major improvements in the way business is conducted, encouraging changes in industry production processes to raise productivity, and other actions that will help develop an industry which achieves internationally-competitive standards.

The National Code of Practice for the Construction Industry (the Code) expresses the principles which Commonwealth, State and Territory Governments agree should underpin the future development of the construction industry in Australia.

The Code emphasises the maintenance of the highest ethical standards in all construction-related activities. The core principles of the Code, supported by the practices and initiatives of each jurisdiction, are aimed at ensuring that the industry:

- is client-focused and respects the rights of clients
- builds relationships on a foundation of trust
- observes the highest ethical principles in tendering
- maintains a positive commitment to continuous improvement and best practice
- supports broadly-based workplace reform
- maintains high standards in occupational health safety and rehabilitation and in environmental management, and
- encourages responsible industrial relations leading to economically-sustainable arrangements.

The principles incorporated in the Code represent the Governments' agreed positions regarding the industry issues detailed. Individual governments will be able to maintain existing codes or develop codes to suit the priorities and circumstances relevant to particular jurisdictions.

It is acknowledged that existing codes or new codes developed will be consistent with the principles established in the Code. Where a relevant State/Territory Code provides for provisions in addition to the Code those provisions will apply in that State/Territory. The Code provides the minimum level of compliance.

APPLICATION OF THE CODE

The construction industry in Australia is one of the largest employers in the country. Its activity in residential and non-residential building and engineering construction produces much of the infrastructure that drives our economy. It also facilitates the delivery of services to the community by government, and contributes to a better working and living environment for everyone

The construction industry includes all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

This National Code of Practice for the Construction Industry in Australia was developed by the Commonwealth, State and Territory Governments.

The Code establishes a set of principles and standards of behaviour that is expected to apply in dealings between clients, their representatives and members of the construction industry. The private sector is to be encouraged to adopt the code on a voluntary basis.

Any party wishing to do business with governments or work on government construction projects will be required to comply with all aspects of the Code applicable to their activities:

- the term “party” in the Code includes but is not limited to: clients, principal contractors, subcontractors, suppliers, consultants, employees, unions—their officials, employees and members and industry associations whilst undertaking a representative role.

Adoption of the Code expresses a commitment to deal only with organisations and personnel in the construction industry whose standards and behaviour conform with the principles expressed in the Code. In particular coercion of any form is prohibited.

Achievement of best practice throughout the industry is the responsibility of all participants and adoption of the principles on private sector projects is strongly encouraged. The industry as a whole and the community will be best served if industry participants adhere to high standards of honesty and integrity.

NATIONAL PRINCIPLES

Client's Rights and Responsibilities

Clients have the right to choose with whom they do business and to determine and communicate the standards of performance and behaviour they expect from all industry participants.

Clients recognise that their expectations play a central role in driving industry improvement and, in future, they will apply even more stringent criteria to identify, encourage and reward better performers.

Clients will base their decisions on the track record of service providers in terms of trust, capacity and capability to perform and a demonstrated ability to deliver high quality solutions.

Clients will also respect the need for fairness and equity in all business transactions and selection processes, and apply these standards consistently in all dealings with the industry.

Relationships

Business relationships must be built upon the essential qualities of trust, cooperation, equity, and honesty. These qualities must be reflected at all links in the contract chain.

All jurisdictions have clearly defined expectations for service providers which reflect this principle and have implemented business practices which help participants to focus on successful project outcomes.

Industry participants are expected to respond to these requirements by a positive commitment to develop relationships that are: cooperative (i.e., founded on shared objectives and shared benefits); built upon the essential qualities of openness, trust, equity and honesty; established for the long rather than short-term; complement and enhance the business outcomes of all parties involved.

To facilitate a cooperative approach a number of jurisdictions are promoting approaches such as Partnering and Alternative Dispute Resolution. These approaches require a commitment by all parties to address dealings positively and cooperate in finding solutions to problems or disputes should they arise.

Competitive Behaviour

Principles of ethical behaviour must be adhered to by all parties, at all times, and at all levels. Tendering processes must be conducted with commitment, honesty and fairness. Anti-competitive behaviour or any other practice which denies other participants legitimate business opportunities are unacceptable. These practices are inconsistent with the establishment and maintenance of ethical business practices which must underlie good working relationships between a client and a service provider and between service providers.

All clients emphasise the need for ethical behaviour at all levels of a project. These expectations are essentially based on the following nine ethical principles:

- all aspects of the tendering process must be conducted with honesty and fairness at all levels of the industry
- parties must conform to all legal obligations
- parties must not engage in any practice which gives one party an improper advantage over another
- tenderers must not engage in any form of collusive practice and must be prepared to attest to their probity
- conditions of tendering must be the same for each tenderer on any particular project
- clients must clearly specify their requirements in the tender documents and indicate criteria for evaluation
- evaluation of tenders must be based on the conditions of tendering and selection criteria defined in the tender documents
- the confidentiality of all information provided in the course of tendering must be preserved
- any party with a conflict of interest must declare that interest as soon as the conflict is known to that party

These principles apply to all parties in the contractual chain thus the terms 'client' and 'tenderer' are interchangeable at each link in the chain. For example, a contractor will act as a client when seeking tenders for subcontract packages.

All jurisdictions emphasise that collusive tendering, participation in price-fixing cartels for either service or supplies, 'bid shopping' or any other practice which seeks to limit competition, are specifically prohibited. Prohibited practices include:

- agreement between tenderers as to who should be the successful tenderer
- any meetings of tenderers to discuss tenders prior to the submission of the tenders if the client is not present
- exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderer

- agreements between tenderers to fix prices or conditions of contract (this means any collaboration between tenderers on prices or conditions to be included in contracts or commissions without the consent of the client)
- any assistance to any tenderer to submit a cover tender (that is, a tender submitted as genuine but which has been deliberately priced in order not to win the contract or commission)
- any agreement between tenderers prior to submission of tenders to fix the rate of payment of employer or industry association fees where the payment of such fees is conditional upon the tenderer being awarded the contract or commission

All jurisdictions agree to promptly report suspected cases of anti-competitive behaviour to the appropriate authority.

The Commonwealth, State and Territory Governments also have a particular responsibility to ensure that the principles in the National Competition Policy Agreements are observed in their own practices and in dealings with industry.

Continuous Improvement & Best Practice

A positive commitment to best practice is required of all industry participants. This commitment will be demonstrated by evidence of continuous improvement; excellent business practices and relationships; effective organisational systems and standards; exceptional people management policies and practices; and, superior time, cost, and quality outcomes.

A commitment to fostering industry development is expected of all service providers and suppliers by clients.

This extends to performance in terms of such things as: business relationships and practices; organisational systems and standards; employee qualifications; people management policies and practices; time, cost and quality outcomes; value for money; training; research and development; equal employment opportunity; effective management of occupational health safety and rehabilitation issues; security of payment; cooperative contracting; pro-active project planning (which includes environmental, business and financial issues); and, ensuring contract management is undertaken with an appropriate level of competence.

The Commonwealth, State and Territory Governments have agreed to use pre-qualification as one strategy to drive the development of a national industry committed to best practice, international competitiveness and the highest ethical behaviour.

Wherever possible the commitment to best practice will be tested and measured using criteria incorporated into pre-qualification and other selection processes. Service providers will be expected to justify claims by reference to past performance or evidence of the implementation, where appropriate, of appropriate business and operating systems and standards. Service providers may also expect to be monitored, reviewed and/or audited during the contract period. Post-contract analysis of performance may also be undertaken.

Workplace Reform

Industry participants are encouraged to adopt a broad-based agenda to improve productivity through the development of workplace and management practices that are flexible and responsive to the business demands of the enterprise and its clients requirements. An Enterprise with this focus will achieve a workplace culture that is recognised for value, quality, innovation and competitiveness and will be a preferred partner for clients' projects.

A broad agenda is being encouraged, aimed at achieving improved productivity by: effective communication; teamwork; high standards in OHS&R; competency-based training and skill formation opportunities; flexible workplace practices; implementation of policies designed to promote access, equity and equal employment opportunity; continuous improvement and best practice.

Clients encourage reform through their own work practices and policies and by requiring evidence of these practices at an appropriate level when selecting service providers.

Occupational Health Safety & Rehabilitation (OHS&R)

OHS&R obligations must be actively addressed by all industry participants. Unequivocal commitment to OHS&R management must be demonstrated in systems that address responsibilities, policies, procedures and performance standards to be met by all parties involved in a project and are directly linked to quality OHS&R outcomes.

The highest priority has been given by all jurisdictions to improvement in the management of OHS&R in the Construction industry.

Service providers must meet their OHS&R obligations according to relevant laws whether working on private or government client's projects and sites. Additionally, they are expected to prove that they have an appropriate OHS&R management system operating within their individual enterprise.

They may also be expected to establish a site specific OHS&R management plan before work commences on a government project or site.

Clients will prefer to deal with service providers who recognise that the active management of OHS&R issues leads to superior safety and less costly outcomes than reliance on the lowest common denominator approach typified by simple regulatory compliance.

Industrial Relations

It is agreed by Australian Governments that the industrial relations principles embodied in this Code are to apply to their construction projects.

Awards and Legal obligations relating to employment

All parties must comply with the provisions of applicable:

- awards and workplace arrangements which have been certified, registered or otherwise approved under the relevant industrial relations legislation; and
- legislative requirements.

Workplace Arrangements

Workplace arrangements which reflect the needs of the enterprise are important elements in achieving continuous improvement and best practice.

The content of the workplace arrangements are a matter for the parties to those arrangements, subject to them meeting legislative requirements. However they may encompass:

- improved OHS and rehabilitation practices;
- training and skill formation strategies;
- multi skilling; and
- flexible work practices, for example in relation to working time.

A party must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to and/or the contents or the form of their workplace arrangements. This does not prevent action sanctioned by relevant industrial relations legislation.

Overaward Payments

“Overaward payment” is defined to mean any payment and/or benefit above that is set out in the relevant award, registered agreement and/or legislation. This includes payments provided for in workplace arrangements.

Decisions on over award payments, including superannuation, redundancy and workers’ compensation insurance, shall be made by the individual

employer to suit the needs of the enterprise. No employer may be compelled to pay benefits above that prescribed in the relevant workers compensation legislation.

A party must not, directly or indirectly, coerce or pressure another party to make over award payments. No employer may be compelled to contribute to any particular redundancy or superannuation fund, or similar body unless that there is an award or legal requirement to do so. This does not prevent action sanctioned by relevant industrial relations legislation.

Project Agreements

Project agreements will only be appropriate for major contracts. Accordingly project agreements incorporating site-wide payments, conditions or benefits may be negotiated where the strategy has first been authorised by the Principal.

The integrity of individual enterprise agreements must be maintained. This means project agreements cannot override the workplace arrangements of individual contractors, subcontractors, consultants and suppliers, nor may they provide conditions which by their nature have effect beyond the duration of the project, such as, for example, redundancy pay and superannuation contributions. While there may be provisions in a relevant workplace arrangement that enables the parties to the arrangement to encompass provisions in a project agreement, there shall be no double counting of “over award” payments.

There shall be no flow on of the provisions of project agreements.

Such agreements should be developed, where possible, in consultation with the subcontractors working on the project. The agreements shall be certified or otherwise approved under the relevant industrial relations legislation.

Freedom of Association

All parties have the right to freedom of association. This means that parties are free to join or not to join industrial associations of their choice and that they are not to be discriminated against or victimised on the grounds of membership or non membership of an industrial association. A person cannot be forced to pay a fee to an organisation if not a member.

Dispute Settlement

All parties are required to make every effort to resolve grievances or disputes with their employees and applicable unions at the enterprise level, in accordance with the procedure outlined in the relevant award or workplace arrangements.

Strike Pay

No payment shall be made to employees for time spent engaged in industrial action, unless payment is legally required or properly authorised by an industrial tribunal (where this is permitted by relevant industrial legislation).

Industrial Impacts

The client of the principal contractor shall be advised during the progress of the work, and at the earliest opportunity, of any industrial relations or OHS&R matter which may have an impact on the construction program, the principal contract, other related contracts or project costs.

Security of Payment

To ensure that all parties receive payments due to them, the highest ethical standards must be observed throughout the contract chain. This specifically includes ensuring the timely progress of the processing, management and finalisation of claims, payments, retentions and securities due under the contract for all parties.

The Commonwealth, State and Territory Governments are applying the following set of principles¹ to security of payment in their jurisdictions:

- Participants have the right to receive full payment as and when due;
- All cash security and retention monies should be secured for the benefit of the party entitled to receive them;
- Payment periods lower in the contractual chain should be compatible with those in the head contract;
- Outstanding payments to participants, to the extent consistent with Commonwealth and State legislation, should receive priority over payments to other unsecured creditors;
- All construction contracts should provide for non payment to be a substantial breach;
- All construction contracts should make provision for alternative dispute resolution mechanisms.
- Only those parties who have the financial and technical capacity and business management skills to carry out and complete their obligations should participate in the industry;
- All construction contracts in the contractual chain should be in writing.

¹ As incorporated into the 'National Actions on Security of Payment', agreed to by Construction Ministers on 18 October 1996

COMPLIANCE PRINCIPLES

The Commonwealth, State and Territory Governments are developing appropriate sanctions, consistent with their business activities and the laws applicable in their respective jurisdictions, to encourage compliance with the principles.

Each jurisdiction will establish effective compliance and enforcement mechanisms to apply to the national code subject to the following principles:

- sanctions are based on the right of the client to choose who they do business with.
- the type of sanctions that is to be applied for an infringement will vary according to the nature of the specific breach and other circumstances.
- in the case of non compliance by a party the sanction may include but not be limited to:
 - the reporting of the breach to an appropriate statutory body or law enforcement agency;
 - a formal warning that continued non-compliance will lead to more severe sanctions;
 - reduction in the number of tendering opportunities that are given eg by excluding the non-complying party from tendering for Government work above a certain value;
 - preclusion from tendering for any Government work for a specified period; and/or;
 - publication of details of the breach and the identification of the party committing the breach; and
 - referral of the breach to the appropriate industry association for action consistent with industry codes of practice
- Full use is to be made of existing remedies and sanctions under existing legislation particularly under federal and state industrial relations laws.
- Each jurisdiction will be expected to ensure that there are avenues for appeal and review where a sanction has been or is to be imposed— appropriate administrative or commercial law mechanisms should be available.
- The Code and/or State Codes should be established as a condition of the tendering process.
- Jurisdictions will establish or provide effective coordinating mechanisms to ensure that the code is applied effectively in all agencies.
- Breaches of the Code in one jurisdiction will be regarded as a relevant factor by other jurisdictions when considering the suitability of parties for government projects.

- Labour Ministers will monitor the effectiveness of the industrial relations and occupational health and safety elements of the Code as a standing agenda item on the Labour Ministers' Council meeting.
- Construction Ministers will monitor the effectiveness of the broader construction elements of the Code as a standing agenda item on the Construction Ministers' Council meeting.

The National Code of Practice for the Construction Industry has been written by the Australian Procurement and Construction Council Inc. (APCC) in consultation with the Department of Labour Advisory Committee (DOLAC).

The APCC is the national reference for policy advice on procurement and construction matters and is the peak Council for industry interface for the Commonwealth, State and Territory Governments in these matters. The APCC convenes meetings of the Procurement and Construction Ministers Council.

DOLAC provides a consultative forum on industrial relations matters of significant interest to the Commonwealth, States and Territories. In this forum, matters of mutual interest are discussed, agreed policies are indorsed and recommendations are made to Commonwealth, State and Territory Governments, through the Labour Ministers' Council (LMC).

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