



Australian Government

**Department of Education, Employment
and Workplace Relations**

Model Tender and Contract Documentation

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**National Code of Practice for the Construction
Industry (the Code) and the Australian Government
Implementation Guidelines (the Guidelines)**

Revised September 2005, Reissued June 2006



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How to use this document:

Enclosed in these grey boxes are instructions on when to apply the clauses.

These are suggestions which can be copied as they appear, or modified according to requirements, however remember to remain consistent and comprehensive.

This document should be read in conjunction with the National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines), revised September 2005, and reissued June 2006.

The Code and Guidelines can be downloaded from: www.workplace.gov.au/building

Introduction

This document is designed to assist Australian Government departments, agencies, authorities, bodies and Contractors to comply with the National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines), revised September 2005, and reissued June 2006.

The Code and Guidelines apply to all building and construction work undertaken for and on behalf of the Australian Government, including by departments, agencies and budget-funded statutory authorities subject to the *Financial Management and Accountability (FMA) Act 1997* and companies covered by the *Commonwealth Authorities and Companies (CAC) Act 1997*.

The Code and Guidelines do not apply to Australian Government funded projects where funding for construction is not an explicit component of the grant (see Section 2.4 of the Guidelines).

All parties invited to express interest in, or tender for, Australian Government building and construction projects or projects to which the Australian Government contributes funding must be informed of the application of the Code and Guidelines to the project.

To ensure compliance, copies of all industrial instruments can be supplied to the Department of Education, Employment and Workplace Relations, National Code Assessment team for assessment against the requirements of the Code and Guidelines or Tenderers can provide the appropriate letter verifying Code Compliance if an assessment has already been undertaken.

For assessment of workplace arrangements, including industrial instruments (awards, workplace agreements, etc) for Code compliance contact:

the National Code Hotline: 1300 731 293

the National Code Mailbox: code.assessment@deewr.gov.au

For Agencies

As with other Government procurement related policies the application of the Code and Guidelines is a matter for agencies to have regard to, within the Governments overall framework of financial management and procurement policy. It is the responsibility of each agency to make inquiries on a project by project basis and consider the extent to which compliance with the Code and Guidelines is required.

The client agency is responsible for ensuring all expressions of interest, tender and contractual documents clearly set out the requirements of the Code and Guidelines.

The relevant model clauses contained below should be included in the client agencies' funding, tendering and contract documentation.

For Contractors

To the extent required by the Commonwealth all contractors undertaking building and construction on projects where the Australian Government contributes funding must ensure compliance with the Code and Guidelines, including ensuring that all expressions of interest, tender and contractual documents which they instigate clearly set out the requirements of the Code and Guidelines.

The relevant model clauses contained in this document should be included in contractors' tendering and contract documentation.

Funding agreement clauses

The Code applies to any construction initiated by an Australian Government agency for the delivery of Australian Government functions or services.

The Code and Guidelines apply to indirectly funded Australian Government projects as set out in Section 2.4 of the Guidelines. In situations where departments and agencies are not the client, but are responsible for administering Australian Government program expenditure involving construction, the department or agency must ensure the grantee or recipient of the Australian Government funding applies the Code and Guidelines to all projects funded with Australian Government funds, as per the thresholds described in Section 2.4 of the Guidelines.

Agencies acting as funding administrators are responsible for ensuring there is a provision in any relevant funding agreement with a recipient organisation which requires the recipient organisation to ensure that all parties involved in the project comply with the Code and Guidelines.

Similarly the Code and Guidelines applies to pre-commitment lease projects; Build, Own, Operate, Transfer (BOOT) and Build, Own, Operate (BOO) projects initiated by an Australian Government agency for the delivery of Australian Government functions or services. In many cases an Australian Government entity will be the subsequent tenant of such projects and can request Code compliance in accordance with Section 2.7 of the Guidelines.

The Code and Guidelines also apply to both Public Private Partnerships (PPPs) and Private Finance Initiatives (PFIs) as set out in Section 2.9 of the Guidelines. The service delivered may be paid for by the Australian Government or directly by the end user.

The Department of Education, Employment and Workplace Relations can provide advice to funding agencies on the Code and Guidelines, including the limited circumstances in which requirements may be waived or varied.

Departments, agencies, CAC Act bodies and contractors should include the following clauses in all funding agreements for both directly and indirectly funded projects:

1. In these clauses:
 - a) **‘the Code’** means the National Code of Practice for the Construction Industry. A copy of the Code appears on the Internet at www.workplace.gov.au/building
 - b) **‘the Guidelines’** means the Australian Government Implementation Guidelines for National Code of Practice for the Construction Industry, Revised September 2005, Reissued June 2006, published by the Department of Education, Employment and Workplace Relations. A copy of the Guidelines appears on the Internet at www.workplace.gov.au/building
 - c) **‘the Organisation’** means the state/territory department, agency or organisation to which the Commonwealth has directed the Program Expenditure
 - d) **‘the Program Expenditure’** means the funding provided by the Commonwealth for the Project
 - e) **‘the Project Parties’** means all contractors, subcontractors, suppliers, consultants and employees who perform work in relation to the Project

- f) **‘the Project’** means the works to be executed through the Program Expenditure.
2. Where the Program Expenditure specifically relates to building and construction activity, subject to the thresholds specified in the Guidelines, the Organisation must comply and ensure that the Project Parties comply with the Code and Guidelines.
 3. The Guidelines require the Organisation to ensure that:
 - a) all requests for tender, expressions of interest, submissions and invitations to join Common Use Arrangements in relation to the Project made by it or any of the Project Parties contain the commitment to apply the Code and Guidelines as set out in the model tender documents; and
 - b) all contracts entered into in relation to the Project by it or any of the Project Parties contain the commitment to apply the Code and Guidelines as set out in the model contract clauses.
 4. The Organisation shall maintain adequate records of compliance by it and each of the Project Parties with the Code and the Guidelines. The Organisation shall permit the Commonwealth and those authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, full access to the premises and records of the Organisation and the Project Parties to:
 - a) inspect any work, material, machinery, appliance, article or facility
 - b) inspect and copy any record relevant to the Project and works governed by this agreement
 - c) interview any person

as is necessary to monitor compliance with the Code and Guidelines.

Additionally, the Organisation shall agree that the Organisation and each of the Project Parties will agree to a request from the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.

5. The Commonwealth and those authorised by it may publish or otherwise disclose information in relation to compliance by the Organisation and the Project Parties with the Code and the Guidelines. The Organisation must obtain the consent of the Project Parties to the publication or disclosure of information under this clause.
6. The Organisation shall not appoint a subcontractor, consultant or material supplier in relation to the Project where the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations.

Minor works and very small contracts (\$25,000 or less)

Australian Government departments, agencies, CAC Act bodies and contractors are required to apply the Code and Guidelines to minor works or very small contracts (where the value of the contract is \$25,000 or less). (See Section 4.4.3 of the Guidelines).

Departments, agencies, CAC Act bodies and contractors may wish to include the following clause in advertisement, tender, purchase orders or contractual documentation rather than the enclosed model tender and contract clauses:

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, reissued June 2006, apply to this project. By agreeing to undertake the works, you will be taken to have read and to agree to comply with the Code and Guidelines.

Advertisement clause: work valued over \$25,000

The Guidelines require Australian Government departments, agencies, CAC Act bodies funding building and construction, and contractors to:

- Ensure tenderers and entities submitting expressions of interest or tenders demonstrate their Code compliance when they lodge an expression of interest or tender for Australian Government building and construction projects.
- Advise all tenderers that they are required to be compliant with the Code and Guidelines at the time they lodge their expression of interest or tender. (See Section 4.2.2 of the Guidelines)
- Advise all tenderers that compliance with the Code and Guidelines is to extend to all subcontractors, consultants and material suppliers who may be engaged by the tenderer on the project. (See Section 4.2.3 of the Guidelines)
- Advise all tenderers that compliance with the Code and Guidelines is to extend to their related entities and future privately funded construction projects in Australia. (See Sections 2.5 and 2.6 of the Guidelines)
- Include in all advertisements calling for expressions of interest or request for tenders etc the following statement:

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, revised September 2005, reissued June 2006, apply to this project.

Conditions for participation clause: work valued over \$25,000

Conditions for participation

The Code and Guidelines require compliance as a condition for participation in the tender for Australian Government funded construction work. The Code and Guidelines must be made available to all interested parties by means set out in section 4.2.1 of the Guidelines.

Documents can be viewed at the Australian Workplace website at www.workplace.gov.au/building. (See Section 4.2.1 of the Guidelines).

Conditions for participation are minimum requirements that must be met in order to be eligible for consideration in a tender.

Departments, agencies, CAC Act bodies and contractors should include the following clause:

"It is a condition for participation that Tenderers comply with the National Code of Practice for the Construction Industry and the Australian Government Implementation Guidelines. It is also a condition of participation in this Tender that, at the time they lodge their expression of interest or tender, the Tenderer must not have been:

- a) precluded from tendering for Australian Government funded work; or
- b) specifically excluded from participating in this Tender.

A failure to meet this condition for participation will mean that the Tenderer will be automatically excluded from the Tender."

Tender clauses: work valued over \$25,000

Departments, agencies, CAC Act bodies and contractors should incorporate the clauses below into all tender documentation (including expressions of interest) for both directly and indirectly funded projects:

1. The Tenderer's attention is drawn to the National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines), revised September 2005, reissued June 2006. Copies of the Code and Guidelines are available at www.workplace.gov.au/building.
2. By submitting an expression of interest or tender to undertake the work/services you:
 - a) will be deemed to have read; and
 - b) agree that you must comply with, the Code and Guidelines.
3. Notwithstanding any other provisions of the Tender Documents, Tenderers hereby consent to the disclosure of information concerning compliance with the Code and Guidelines, including details of whether or not a sanction (see Section 9.2 of the Guidelines) has been imposed. This consent extends to disclosure by the Commonwealth, its agencies and ministers, and disclosure to others for the purposes of facilitating compliance with the Code and Guidelines and the exercise of their statutory and portfolio responsibilities. Tenderers shall ensure that their proposed subcontractors, consultants and material suppliers are also aware of, and agree to comply with, these rights of use and disclosure.
4. Tenderers should be aware that the Code and Guidelines apply to:
 - a) the project which is the subject of these Tender Documents; and
 - b) all construction building work undertaken by the Tenderer and its related entities (see section 2.6 of the Guidelines) thereafter as defined in the Guidelines, including work on all new privately funded construction projects in Australia. For further information on the definition of privately funded construction projects, see section 2.5 of the Guidelines.
5. It is a condition of tender that Tenderers comply with the Code and Guidelines. As part of their tender response, Tenderers must submit a signed declaration of compliance in accordance with the Declaration of Compliance set out on pages 10 to 13.
6. Each Tenderer must indicate in its Tender response:
 - a) how the Tenderer and its related entities have complied with the Code and Guidelines in the past (if the Tenderer has undertaken Australian Government funded construction work in the past);
 - b) how the Tenderer intends to comply with the Code and Guidelines in performing the Contract, should it be the successful Tenderer; and
 - c) where the Tenderer proposes to subcontract an element of the project, either:
 - i) the information detailed in the above subclauses (a) and (b) in relation to each subcontractor, or
 - ii) how the Tenderer intends to ensure each subcontractor complies with the Code and Guidelines.

Declaration of Compliance

The following Declaration of Compliance should be included as an attachment to tender documentation (including expressions of interest) for both directly and indirectly funded projects:

Declaration of Compliance with the National Code of Practice for the Construction Industry and the Australian Government Implementation Guidelines (Revised September 2005, Reissued June 2006)

Name of Australian Government project tendered for:

.....
.....

Name of Tenderer, ABN and ACN:

.....
.....

1. The Tenderer confirms that it has complied with the National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines), revised September 2005, reissued June 2006, in preparing this Tender.
2. The Tenderer undertakes that it complies with Code and Guidelines, and has complied with the Code and Guidelines from the time of lodgement of this tender, and that it will require compliance by its related entities (see section 2.6 of the Guidelines).
3. The Tenderer undertakes to ensure compliance from all subcontractors (which includes consultants and material suppliers) engaged on this project, should it be the successful Tenderer. All contracts must expressly require compliance with the Code and Guidelines.
4. The Tenderer agrees that it and its subcontractors and its related entities will provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:
 - (a) inspect any work, material, machinery, appliance, article or facility;
 - (b) inspect and copy any record relevant to the Project and Works the subject of this Contract;
 - (c) interview any person; and
 - (d) any document requested under this contract. The document must be provided within the period specified either in person, by fax or by post,as is necessary to demonstrate its compliance with the Code and Guidelines.
5. The Tenderer acknowledges that it is aware the Commonwealth or Minister for Employment and Workplace Relations may impose a sanction on a Tenderer or Contractor that does not comply with the Code and Guidelines.

The sanction imposed may include but is not limited to:

- (a) the reporting of the breach to an appropriate statutory body or law enforcement agency (if there is evidence that the breach may also be a breach of a Commonwealth or State law), or industry association;

- (b) issuing of a formal warning that future breaches may lead to more significant sanctions;
 - (c) preclusion from Tendering for any Commonwealth work for a specified period;
 - (d) communication of sanction details to all Commonwealth agencies to ensure a 'whole-of-government' approach;
 - (e) publication of details of the breach and identification of the party committing the breach; and
 - (f) a reduction in the number of tendering opportunities that are given.
6. The Tenderer is to select which of the following clauses in italics is appropriate and delete the remaining clause.
- a) :
- The Tenderer hereby gives its consent, and confirms that its related entities give their consent, to disclosure by the Commonwealth, its agencies and ministers, of information concerning the Tenderer's and its related entities' compliance with the Code and Guidelines and whether or not a sanction has been imposed on the Tenderer and/or related entity of the Tenderer, for the exercise of their statutory and portfolio responsibilities (the Purposes).*
- b) OR,:
- The Tenderer has previously given its consent, and confirms that its related entities have previously given their consent, to disclosure by the Commonwealth, its agencies and ministers, of information concerning the Tenderer's and its related entities' compliance with the Code and Guidelines and whether or not a sanction has been imposed on the Tenderer and/or a related entity of the Tenderer for the exercise of their statutory and portfolio responsibilities (the Purposes), and confirms that the Tenderer and its related entities have not revoked that consent.*
7. The Tenderer has obtained or will obtain the consent of each subcontractor, consultant and material supplier proposed in its Tender to disclosure by the Commonwealth, its agencies and ministers, of information concerning the proposed subcontractors, compliance with the Code and Guidelines and whether or not a sanction has been imposed on any proposed subcontractor, for the Purposes.
8. The Tenderer acknowledges that the consents provided in clause 6 are not limited to this Tender process as the Tenderer is expected to comply with the Code in future projects.
9. The Tenderer will:
- (a) Describe how the Tenderer has complied with the Code and Guidelines in the past (if the Tenderer has undertaken Australian Government funded construction work in the past) and how it will comply if successful. For example:
 - (i) comply with the Code and Guidelines;
 - (ii) require compliance with the Code and Guidelines from all subcontractors before doing business with them;
 - (iii) apply the Code and Guidelines to privately funded projects that commence after they first lodge an expression of interest or tender for Australian Government projects if the expression of interest or tender occurs on or after 1 November 2005;

- (iv) ensure that contractual documents allow for a person occupying a position in the ABCC to access sites, documents and personnel to monitor compliance with the Code and Guidelines, including privately funded construction sites;
 - (v) project managers or head contractors must establish appropriate processes to ensure freedom of association;
 - (vi) ensure there is an occupational health safety and rehabilitation (OHS&R) plan for the project;
 - (vii) ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action to the client agency;
 - (viii) respond to requests for information concerning Code-related matters made on behalf of Code Monitoring Group (CMG);
 - (ix) where practicable, ensure contractors or subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention;
 - (x) ensure that CMG secretariat is notified of any alleged breaches, voluntary remedial action taken or other Code-related matters within 21 days of the party becoming aware of the alleged breach; and
 - (xi) be aware that and ensure that sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.
- (b) Where the Tenderer proposes to subcontract an element of the work, the Tenderer is either to:
- (i) provide the information detailed at (a) in relation to each subcontractor; or
 - (ii) detail how the Tenderer intends to ensure compliance with the Code and Guidelines by each subcontractor.

Privately Funded Projects:

The Tenderer declares that, in respect to privately funded projects:

10. The Tenderer and its related entities will comply with the Code and Guidelines on all the Tenderer's and its related entities' future privately funded projects.
11. The Tenderer shall maintain adequate records of compliance with the Code and Guidelines by the Tenderer, its subcontractors and related entities.
12. The Tenderer agrees that it and any of its related entities will provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:
 - (a) inspect any work, material, machinery, appliance, article or facility;
 - (b) inspect and copy any record relevant to the Project and Works the subject of this Contract; and

(c) interview any person

as is necessary to allow validation of its compliance with the Code and Guidelines.

Additionally, the Tenderer agrees that the Tenderer and its related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.

13. The Tenderer will ensure that the Tenderer and its related entities permit the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to have access to records and to the related entities' and subcontractors' premises (to inspect and copy records), as is necessary to ensure that the subcontractors and related entities are complying with the Code and Guidelines.

[To be signed by Tenderer—insert appropriate signature block.]

Contract clauses: agreements with contractors

The Code and Guidelines require that compliance must be made a condition of tender for Australian Government funded construction work. Departments, agencies, CAC Act bodies and contractors should incorporate the clauses below into all contract documentation for both directly and indirectly funded projects:

1. The Contractor must comply with the National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines), revised September 2005, and reissued June 2006. Copies of the Code and Guidelines are available at www.workplace.gov.au/building.
2. Compliance with the Code and Guidelines shall not relieve the Contractor from responsibility to perform the Contract, or from liability for any defect in the works arising from compliance with the Code and Guidelines.
3. Where a change in the Contract is proposed and that change would affect compliance with the Code and Guidelines, the Contractor must submit a report to the Commonwealth specifying the extent to which the Contractor's compliance with the Code and Guidelines will be affected.
4. The Contractor shall maintain adequate records of the compliance with the Code and Guidelines by:
 - (a) the Contractor;
 - (b) its Subcontractors;
 - (c) consultants;
 - (d) material suppliers (see Guidelines for meaning including section 2.1 of the Guidelines); and
 - (e) its Related Entities (see Guidelines for meaning including section 2.6 of the Guidelines).
5. If the Contractor does not comply with the requirements of the Code or the Guidelines in the performance of this Contract such that a sanction is applied by the Minister for Employment and Workplace Relations, the Code Monitoring Group or the Commonwealth, without prejudice to any rights that would otherwise accrue, those parties shall be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Contractor or a related entity in respect of work funded by the Commonwealth or its agencies.
6. The Contractor must not appoint a subcontractor, consultant or material supplier in relation to the Project where the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations.
7. The Contractor agrees to require that it and its subcontractors, consultants or material suppliers and its related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:
 - (a) inspect any work, material, machinery, appliance, article or facility;
 - (b) inspect and copy any record relevant to the Project and Works the subject of this Contract; and

(c) interview any person

as is necessary to demonstrate its compliance with the Code and Guidelines.

8. Additionally, the Contractor agrees that the Contractor and its related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.
9. For the avoidance of doubt, Clause 7 applies in relation to the Contractor's new privately funded construction sites.
10. The Contractor shall ensure that all subcontracts impose obligations on the subcontractors equivalent to the obligations under these Contract Clauses.