



**Australian Government**

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

# **Model Tender and Contract Documentation**

August 2009

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

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## How to use this document:

Enclosed in these grey boxes are instructions on the application of the model clauses.

These are suggestions which may be added to documentation as they appear, or modified according to your requirements.

***This document should be read in conjunction with the National Code of Practice for the Construction Industry (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines).***

The Code and Guidelines can be downloaded from: [www.deewr.gov.au/building](http://www.deewr.gov.au/building)



# INTRODUCTION

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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 (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines).

The Code and Guidelines apply to all building and construction work undertaken for and on behalf of the Australian Government, including by all Departments of State, Departments of the Parliament, prescribed agencies named in the *Financial Management and Accountability Act 1997* (FMA) and all the Commonwealth authorities and wholly-owned Commonwealth companies required by a General Policy Order, issued under section 48A of the *Commonwealth Authorities and Companies Act 1997* (prescribed CAC Act bodies).

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 3.3.3 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 industrial instruments can be submitted to the Department of Education, Employment and Workplace Relations for assessment against the requirements of the Code and Guidelines.

For assessment of industrial instruments contact:

- the National Code Hotline: **1300 731 293**
- the National Code Mailbox: **code.assessment@deewr.gov.au**

## For Agencies

The Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry is government policy and therefore agencies must act in a manner that is not inconsistent with the Code and Guidelines on construction projects. It is the responsibility of each agency to consider and document the extent to which compliance with the Code and Guidelines is required on a project by project basis.

Client agencies are responsible for ensuring all expressions of interest, tender and contractual documentation clearly set out the requirements of the Code and Guidelines, and include the relevant model clauses where applicable.

## For Contractors

To the extent required by the Commonwealth, all contractors undertaking building and construction activities on projects where the Australian Government contributes funding must ensure compliance with the Code and Guidelines. This includes, but is not limited to, ensuring 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

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The Code and Guidelines apply to construction projects initiated by Australian Government agencies.

The Code and Guidelines also apply to construction projects which have been indirectly funded by the Australian Government subject to the thresholds in Section 3.3.1 of the Guidelines.

Where departments and agencies are not the direct 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 subject to the thresholds in Section 3.3.1 of the Guidelines.

Agencies acting as funding administrators must include a provision in funding agreements, requiring recipient organisations and all parties to a project to apply the Code and Guidelines.

Similarly, the Code and Guidelines apply 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 3.6 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 3.8 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, prescribed CAC Act bodies and contractors that are required to comply with the Code and Guidelines 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 1997. The Code can be downloaded from [www.deewr.gov.au/building](http://www.deewr.gov.au/building)
  - b) **'the Guidelines'** means the Australian Government Implementation Guidelines for National Code of Practice for the Construction Industry, August 2009. The Guidelines can be downloaded from [www.deewr.gov.au/building](http://www.deewr.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, consultants and employees who perform on site 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 must maintain adequate records of compliance by it, and each of the Project Parties, with the Code and the Guidelines. The Organisation must 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; and
  - c) interview any person

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

Additionally, the Organisation undertakes that it, 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. While acknowledging that value for money is the core principle underpinning decisions on government procurement, when assessing tenders the Organisation may preference contractors, subcontractors and consultants that have a demonstrated commitment to:
  - a) adding and/or retaining trainees and apprentices;
  - b) increasing the participation of women in all aspects of the industry; or
  - c) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.
7. The Organisation must not appoint a contractor, subcontractor or consultant in relation to the Project where:
  - a) the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations; or
  - b) the contractor, subcontractor or consultant has had a judicial decision against them relating to employee entitlements, not including decisions under appeal, and has not paid the claim.

## MINOR WORKS AND VERY SMALL CONTRACTS (\$25,000 OR LESS)

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Departments, agencies and prescribed CAC Act bodies 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 4.5.3 of the Guidelines).

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

*The National Code of Practice for the Construction Industry (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines), 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.*

Contractors and sub contractors **must** include the following clause in advertisement, tender, purchase orders or contractual documentation rather than the full model tender and contract clauses (see section 4.5.4 of the Guidelines).

*The National Code of Practice for the Construction Industry (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines), 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

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The Guidelines require Departments, agencies, prescribed CAC Act bodies 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 5.3.1 of the Guidelines).
- Advise all tenderers that compliance with the Code and Guidelines is to extend to all subcontractors and consultants who may be engaged by the tenderer on the Project (see Section 5.4.1 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 3.4 and 3.5 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 conjunction with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009, apply to this project.*

## CONDITIONS FOR PARTICIPATION CLAUSE: WORK VALUED OVER \$25,000

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### Conditions for participation

The Code and Guidelines require compliance as a condition for participation in tenders for Australian Government funded construction work. Departments, agencies, prescribed CAC Act bodies and contractors must advise interested parties that the Code and Guidelines can be obtained from the Department's website [www.deewr.gov.au/building](http://www.deewr.gov.au/building).

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

Departments, agencies prescribed 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 (Code) and the Australian Government Implementation Guidelines, August 2009 (Guidelines).*

*It is also a condition for participation in this Tender that, at the time of lodgement of the expression of interest or tender, the Tenderer must not be precluded from tendering for Australian Government funded building and construction work.*

*Further, consistent with Section 4.2.2 of the Guidelines, Funding Entities will not enter into contracts with contractors who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and have not paid the claim.*

## TENDER CLAUSES: WORK VALUED OVER \$25,000

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Departments, agencies, prescribed CAC 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 (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines). Copies of the Code and Guidelines are available at [www.deewr.gov.au/building](http://www.deewr.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 8.2 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 must ensure that their proposed subcontractors and consultants 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 and building work undertaken by the Tenderer and its related entities (see Section 3.5 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 3.4 of the Guidelines.
5. Tenderers are required to 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 which is attached to this Request for Tender.
6. Each Tenderer must indicate in its Tender response:
  - a) whether the Tenderer or a related entity of the Tender has ever been subject to a sanction imposed under the Code and Guidelines;
  - b) whether the Tenderer has had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and has not paid the claim;
  - c) whether the Tenderer has had any adverse court, tribunal, industrial relations commission or Fair Work Australia finding, order or penalty awarded against them in the last two years (and if so provide details);
  - d) 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);
  - e) how the Tenderer intends to comply with the Code and Guidelines in performing the Contract, should it be the successful Tenderer; and
  - f) 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.

7. While acknowledging that value for money is the core principle underpinning decisions on Government procurement, tenderers should note that when assessing tenders, preference may be given to Tenders that demonstrate a commitment to:
- a) adding and/or retaining trainees and apprentices;
  - b) increasing the participation of women in all aspects of the industry; or
  - c) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.

# DECLARATION OF COMPLIANCE

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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, August 2009.**

### **Name of Australian Government project tendered for:**

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Name of Tenderer, ABN and ACN:

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1. The Tenderer confirms that it has complied with the National Code of Practice for the Construction Industry (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines), 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 3.5 of the Guidelines).
3. The Tenderer undertakes to ensure compliance from all subcontractors and consultants 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 funded building and construction 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 (see Section 8.2.2 of the Guidelines).
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).*
- OR
- b) *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 and consultant 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 and Guidelines 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, the tenderer will:
    - (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 Office of the Australian Building and Construction Commissioner to access sites, documents and personnel to monitor compliance with the Code and Guidelines, including privately funded construction sites;
    - (v) ensure project managers or head contractors 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) respond to requests for information concerning Code-related matters made on behalf of Code Monitoring Group (CMG);
    - (viii) where practicable, ensure contractors or subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention;
    - (ix) 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

- (x) 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.
- (c) Ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or project managers report such action to the Funding Agency.

**Privately Funded Projects:**

10. The Tenderer declares that, in respect to privately funded projects:
- (a) 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.
  - (b) The Tenderer must maintain adequate records of compliance with the Code and Guidelines by the Tenderer, its subcontractors and related entities.
  - (c) 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:
    - (i) inspect any work, material, machinery, appliance, article or facility;
    - (ii) inspect and copy any record relevant to the Project the subject of this Contract; and
    - (iii) interview any person,as is necessary to allow validation of its compliance with the Code and Guidelines.
  - (d) 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.
  - (e) 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

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

1. The Contractor must comply with the National Code of Practice for the Construction Industry (Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines). Copies of the Code and Guidelines are available at [www.deewr.gov.au/building](http://www.deewr.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 must maintain adequate records of the compliance with the Code and Guidelines by:
  - (a) the Contractor;
  - (b) its Subcontractors;
  - (c) consultants; and
  - (d) its Related Entities (see Guidelines for meaning including Section 3.5 of the Guidelines).
5. If the Contractor does not comply with the requirements of the Code or 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. While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Contractor may give preference to subcontractors and consultants that have a demonstrated commitment to:
  - (a) adding and/or retaining trainees and apprentices;
  - (b) increasing the participation of women in all aspects of the industry; or
  - (c) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.
7. The Contractor must not appoint a subcontractor or consultant in relation to the Project where:
  - (a) the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations; or
  - (b) the subcontractor or consultant has had a judicial decision against them relating to employee entitlements, not including decisions under appeal, and has not paid the claim.

8. The Contractor agrees to require that it and its subcontractors or consultants 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 the subject of this Contract; and
  - (c) interview any personas is necessary to demonstrate its compliance with the Code and Guidelines.
9. 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.
10. The Contractor must ensure that all subcontracts impose obligations on sub contractors equivalent to the obligations under these Contract Clauses.



