



Australian Government
**Australian Building and
Construction Commission**

**Code for the Tendering and Performance of
Commonwealth Funded Building Work 2016**

**Funding Entity and Recipient Model Clauses
Indirectly Commonwealth Funded Building Work**

January 2018

CONTENTS

1.	Purpose	1
2.	Advertisement clause for Funding Entities	2
3.	Funding agreement clauses	3
4.	Advertisement clause for Funding Recipients	6
5.	Tender clauses for Funding Recipients	7
6.	Declaration of Compliance for Contractors of Funding Recipients	9
7.	Contract clauses - agreements between Funding Recipients and contractors	4

1. Purpose

This document contains model clauses that can be used by:

- Funding Entities in funding agreements (however described); and
- Funding Recipients in expression of interest or tender documentation (however described) and contracts

for building work that is indirectly funded by the Commonwealth, to which the *Code for the Tendering and Performance of Building Work 2016* (Building Code) applies.

The model clauses in this document can be adapted to suit funding and contractual arrangements that may be used for specific projects, provided that funding entities and recipients using these model clauses ensure they meet the applicable requirements of the Building Code.

In the model clauses, the following terms are used:

- 'Works' is used to refer to the indirectly Commonwealth funded building work that is the subject of the funding agreement, expression of interest, tender or contract.
- 'Contractor' is used to refer to the building contractor or building industry participant who enters into a contract with the Funding Recipient for the Works.
- 'Funding Entity' has the meaning given in section 4 of the Building Code.
- 'Funding Recipient' is used to refer to the entity that the Commonwealth is providing funding or assistance to in relation to building work to which the Building Code applies.
- 'Subcontractor' is used to refer to any building contractor or building industry participant who enters into a subcontract with the Contractor in relation to the Works.
- 'Contract' is used to refer to a contract between the Contractor and the Funding Recipient for the Works.

The Building Code can be downloaded from:

<https://www.legislation.gov.au/Details/F2017C00125>

2. Advertisement clause for Funding Entities

The clause below can be used by Funding Entities for advertisements, grant guidelines or other notices (however described) inviting parties to apply for funding to undertake indirectly Commonwealth Funded Building Work to which the Building Code applies.

COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

The *Code for the Tendering and Performance of Building Work 2016* applies to any building work funded through this [grant / program], subject to the financial thresholds set out in Schedule 1 of the Code being met.

3. Funding agreement clauses

The clauses below can be used by Funding Entities in funding agreements (however described) for indirectly Commonwealth Funded Building Work to which the Building Code applies.

COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.1. In these clauses:

ABCC	means the body referred to in subsection 29(2) of the Act.
Act	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
Building Code	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at https://www.legislation.gov.au/Details/F2017C00125
Building Contractor	has the same meaning as in the Act.
Building Industry Participant	has the same meaning as in the Act.
Building Work	has the same meaning as in subsection 3(4) of the Building Code.
Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code.
Contractor	means a Building Contractor or Building Industry Participant who the Funding Recipient has entered, or proposes to enter, into a contract with to undertake any of the Works.
Exclusion Sanction	has the same meaning as in subsection 3(3) of the Building Code.
Funding	means the funding provided by the Commonwealth to the Funding Recipient.
Funding Recipient	means the entity that the Commonwealth is providing funding or assistance to in relation to building work to which the Building Code applies.
Related Entity	has the same meaning as in subsection 3(2) of the Building Code.
Works	means Commonwealth Funded Building Work that is being indirectly funded by the Commonwealth through the provision of the Funding to the Funding Recipient.

1.1.2. The Funding Recipient must ensure that:

- a. tender processes and calls for expressions of interest (howsoever described) in respect of Commonwealth Funded Building Work are conducted in a manner consistent with this code of practice; and
 - b. respondents are only permitted to participate in tender processes where the respondent is not subject to an exclusion sanction.
- 1.1.3. The Funding Recipient must ensure that any request for expressions of interest or request for tender (howsoever described) for Commonwealth Funded Building Work requires a respondent:
- a. to confirm that the respondent and any related entity will comply with the Building Code when undertaking the Commonwealth Funded Building Work; and
 - b. to confirm that the respondent, and any related entities, will comply with the Building Code from the time of lodging an expression of interest or tender response (if not already obliged to do so); and
 - c. to confirm that it is not subject to an exclusion sanction at the time of lodging an expression of interest or tender; and
 - d. to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce. Such commitment may be evidenced by compliance with any state or territory government building training policies and supporting the delivery of nationally endorsed building and construction competencies; and
 - e. to include details of the number of current apprentice and trainee employees and the number and classes of persons that hold visas under the *Migration Act 1958* that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth Funded Building Work; and
 - f. to advise whether the respondent has, within the preceding 3 year period:
 - i. had an adverse decision, direction or order made by a court or tribunal for a breach of a designated building law, work health and safety law or the *Migration Act 1958*; or
 - ii. been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) including by any related entity to a building contractor or building industry participant; or
 - iii. owed any unsatisfied judgement debts (including such debts owed by any related entity) to a building contractor or building industry participant.
- 1.1.4. Where the value of the Commonwealth's contribution to the project that includes the Works meets the financial thresholds set out in Item 1, Schedule 2 to the Building Code, the Funding Recipient must:

- a. ensure the requirement to have a Workplace Relations Management Plan (WRMP) for the Works approved by the ABCC is included in all expression of interest and tender documents; and
 - b. on behalf of the funding entity:
 - i. apply to the ABCC to have a WRMP for the Works approved; and
 - ii. ensure that an application to the ABCC for approval of a WRMP for the Works is made in the manner and form required by the ABC Commissioner; and
 - iii. ensure that the proposed WRMP for the Works is accompanied by any supporting evidence required by the ABCC; and
 - iv. obtain and provide additional information to the ABCC when requested, to enable the ABCC to make a decision whether or not to approve the proposed WRMP for the Works.
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4. Advertisement clause for Funding Recipients

The clause below may be used by Funding Recipients for advertisements calling for expressions of interest or requests for tender (however described) for indirectly Commonwealth Funded Building Work to which the Building Code applies.

COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

The *Code for the Tendering and Performance of Building Work 2016* applies to the building work associated with this project. By submitting an expression of interest in, or tender for, this project, you will become subject to the *Code for the Tendering and Performance of Building Work 2016*.

5. Tender clauses for Funding Recipients

The clauses below may be used by Funding Recipients in expression of interest or tender documentation (however described) for indirectly Commonwealth Funded Building Work to which the Building Code applies. The appropriate terminology should be selected in the below clauses to reflect whether those clauses are being used in expression of interest documentation or tender documentation:

COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.5. In these clauses:

ABCC	means the body referred to in subsection 29(2) of the Act.
Act	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
Building Code	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at https://www.legislation.gov.au/Details/F2017C00125
Building Work	has the same meaning as in subsection 3(4) of the Building Code.
Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code.
Exclusion Sanction	has the same meaning as in subsection 3(3) of the Building Code.
Related Entity	has the same meaning as in subsection 3(2) of the Building Code.
Works	means Commonwealth Funded Building Work that is the subject of this [Request for Expression of Interest/Request for Tender].

1.1.6. The Building Code applies to the Works.

1.1.7. All tender processes and calls for expressions of interest (howsoever described) in respect of the Works will be conducted in a manner that is consistent with the Building Code.

1.1.8. The [Respondent/Tenderer] is only permitted to participate in the tender processes (howsoever described) in respect of the Works where the [Respondent/Tenderer] is not subject to an exclusion sanction.

1.1.9. As part of their [response/tender], [Respondents/Tenderers] must submit:

- a signed "Declaration of Compliance" which is attached to this [Request for Expression of Interest/Request for Tender]; and
- the further information outlined in Attachment A to the "Declaration of Compliance".

To be included in expression of interest documentation (but not tender documentation) where the Commonwealth's contribution to the project that includes the Works meets the financial thresholds set out in Item 1, Schedule 2 to the Building Code.

1.1.6 Where the Funding Recipient issues a Request for Tender in relation to the Works, Tenderers will be required to submit a Workplace Relations Management Plan with their tenders for approval by the ABCC in accordance with Part 6 of the Building Code.

To be included in tender documentation (but not expression of interest documentation) where the Commonwealth's contribution to the project that includes the Works meets the financial thresholds set out in Item 1, Schedule 2 to the Building Code.

1.1.6 Tenderers must submit a Workplace Relations Management Plan with their tender for approval by the ABCC in accordance with Part 6 of the Building Code.

6. Declaration of Compliance for Contractors of Funding Recipients

The Declaration of Compliance below is the proposed attachment to the clause set out above in Part 5 and may be included by Funding Recipients as an attachment to expression of interest or tender documentation (however described) for indirectly Commonwealth Funded Building Work to which the Building Code applies. The appropriate terminology should be selected in the below Declaration of Compliance to reflect whether it is being used in expression of interest documentation or tender documentation.

DECLARATION OF COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.10. In this Declaration of Compliance:

ABCC	means the body referred to in subsection 29(2) of the Act.
ABC Commissioner	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
Act	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
Building Code	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at https://www.legislation.gov.au/Details/F2017C00125
Building Contractor	has the same meaning as in the Act.
Building Industry Participant	has the same meaning as in the Act.
Building Work	has the same meaning as in subsection 3(4) of the Building Code.
Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code.
Enterprise Agreement	has the same meaning as in the <i>Fair Work Act 2009</i> .
Exclusion Sanction	has the same meaning as in subsection 3(3) of the Building Code.
Related Entity	has the same meaning as in subsection 3(2) of the Building Code.
Works	means the Commonwealth Funded Building Work that is the subject of this [Request for Expression of Interest/Request for Tender].

Name of project to which the Works relate: _____

Name of [Respondent/Tenderer], ABN and ACN: _____

- 1.1.11. The [Respondent/Tenderer] confirms that it and any Related Entity will comply with the Building Code when undertaking the Works should it be the successful [Respondent/Tenderer] in relation to the Works.
- 1.1.12. The [Respondent/Tenderer] confirms that it, and any Related Entities, will comply with the Building Code from the time of lodging an expression of interest or tender response (if not already obliged to do so), and that it has complied with the Building Code in preparing its [response/tender].
- 1.1.13. The [Respondent/Tenderer] confirms that it is not subject to an exclusion sanction at the time of lodging this [response/tender].
- 1.1.14. The [Respondent/Tenderer] acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code and undertakes to ensure that it and its subcontractors will comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the Act, requests to interview any person under section 74 of the Act, requests to produce records or documents under sections 74 and 77 of the Act and responding to requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
- 1.1.15. Should the [Respondent/Tenderer] be the successful tenderer in relation to the Works and proposes to subcontract any of the Works, the [Respondent/Tenderer] must ensure that any request for expressions of interest or requests for tender (howsoever described) for the Works requires a person responding to the tender:
- a. to comply with the Building Code; and
 - b. to confirm that it and its related entities meet the requirements of section 11 of the Building Code; and
 - c. to confirm that it is not subject to an exclusion sanction.
- 1.1.16. The [Respondent/Tenderer] declares that where it proposes to subcontract any of the Works, should it be the successful Tenderer, it must:
- a. not enter into a subcontract with a subcontractor, which could be required to comply with the Building Code, and that:
 - i. is covered by, or has Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code; or
 - ii. is subject to an Exclusion Sanction or is excluded from performing Building Work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner.
 - b. only enter into a subcontract where:
 - i. the subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to

the Building Code (located in Part 4 in the document titled *Model Clauses Type B-Indirectly Funded* available on the ABCC website (www.abcc.gov.au)); and

- ii. the subcontract with the subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code (located in Part 5 in the document titled *Model Clauses Type B-Indirectly Funded* available on the ABCC website (www.abcc.gov.au));.

- 1.1.17. The [Respondent/Tenderer] must ensure that an agreement entered into in relation to the Works with a subcontractor requires the subcontractor to act consistently with the Building Code in respect of the Works.
- 1.1.18. The [Respondent/Tenderer] must ensure that subcontractors comply with the Building Code in respect of the Works.
- 1.1.19. The [Respondent/Tenderer] must ensure as far as is reasonably practicable that subcontractors that are engaged by the [Respondent/Tenderer] in respect of the Works take remedial action to rectify non-compliant behaviour.
- 1.1.20. The [Respondent/Tenderer] must ensure that:
- a. it will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia; and
 - b. an agreement entered into in relation to the Works with a subcontractor requires the subcontractor to only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia [NOTE: Clauses 1.1.20(a) and (b) are not required on indirectly Commonwealth funded building work but may be included as a matter of best practice].
- 1.1.21. The [Respondent/Tenderer] declares that it has provided all of the further information required by Attachment A to this Declaration of Compliance.

To be included in tender documentation (but not expression of interest documentation) where the Commonwealth's contribution to the project that includes the Works meets the financial thresholds set out in Item 1, Schedule 2 to the Building Code.

- 1.1.6 The Tenderer declares that it has provided as part of its tender a Workplace Relations Management Plan for approval by the ABCC in accordance with Part 6 of the Building Code.

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

ATTACHMENT A – INFORMATION REGARDING COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

[Respondents/Tenderers] must provide the following information as part of their Declaration of Compliance. This information can either be set out in this table or in an annexure to this Attachment and the Declaration of Compliance.

Section One – required for EOI and tender responses (however described)

Item	Requirement	Compliance
1	Does the [Respondent/Tenderer] positively commit to the provision of appropriate training and skills development for their workforce, and, if so, what evidence can the [Respondent/Tenderer] supply in relation to this (for example, evidence of its compliance with any state or territory government building training policies and evidence of its support in the delivery of nationally endorsed building and construction competencies)?	<p data-bbox="834 528 943 573">Yes/No</p> <hr/> <p data-bbox="834 663 943 707">Details:</p>
2	How many current apprentice and trainee employees are engaged or intended to be engaged by the [Respondent/Tenderer] to undertake the Works?	<p data-bbox="834 1088 943 1133">Details:</p>
3	How many and what classes of persons that hold visas under the <i>Migration Act 1958</i> are engaged or intended to be engaged by the [Respondent/Tenderer] to undertake the Works?	<p data-bbox="834 1368 943 1413">Details:</p>
4	Has the [Respondent/Tenderer] within the preceding 3 years had an adverse decision, direction or order of a court or tribunal made against it for a breach of a designated building law, work health and safety law or the <i>Migration Act 1958</i> ?	<p data-bbox="834 1630 943 1675">Yes / No</p> <hr/> <p data-bbox="834 1709 943 1753">Details:</p>
5		<p data-bbox="834 1966 943 2011">Yes / No</p>

	<p>Has the [Respondent/Tenderer] or its Related Entities within the preceding 3 years been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of Building Work) to a Building Contractor or Building Industry Participant?</p>	<p>Details:</p>
6	<p>Has the [Respondent/Tenderer] or its Related Entities within the preceding 3 years owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant?</p>	<p>Yes / No</p> <hr/> <p>Details:</p>

Section Two – required for tender responses only (to be included in tender documentation (but not expression of interest documentation))

7	To what extent does the Tenderer intend to use domestically sourced and manufactured building materials to undertake the Works?	Details:
8	Whether the building materials to be used to undertake the building work comply with relevant Australian standards published by, or on behalf of, Standards Australia?	Details:
9	What is the Tenderer's assessment of the whole-of-life costs of the project to which the Works relate?	Details:
10	What does the Tenderer consider the impact on jobs will be of the project to which the Works relate?	Details:
11	Does the Tenderer consider that the project to which the Works relate will contribute to skills growth?	Yes/No

7. Contract clauses - agreements between Funding Recipients and contractors

The clauses below can be used by Funding Recipients in contracts with Building Contractors or Building Industry Participants to undertake indirectly Commonwealth Funded Building Work to which the Building Code applies:

COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.22. In these clauses:

ABCC	means the body referred to in subsection 29(2) of the Act.
ABC Commissioner	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
Act	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
Building Code	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at https://www.legislation.gov.au/Details/F2017C00125 .
Building Contractor	has the same meaning as in the Act.
Building Industry Participant	has the same meaning as in the Act.
Building Work	has the same meaning as in subsection 3(4) of the Building Code.
Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code.
Exclusion Sanction	has the same meaning as in subsection 3(3) of the Building Code.
Subcontractor	means a Building Contractor or Building Industry Participant who the Contractor has entered, or proposes to enter, into a subcontract with to undertake any of the Works.
Works	means Commonwealth Funded Building Work that is the subject of this Contract.

1.1.23. The Contractor declares as at the date of commencement of this Contract in relation to Works that it and its subcontractors are not subject to an exclusion sanction.

1.1.24. The Contractor:

- a. declares as at the date of commencement of this Contract in relation to the Works; and
- b. must ensure during the term of this Contract in relation to the Works:

that it and its Subcontractors will comply with the Building Code.

- 1.1.25. Compliance with the Building Code does not relieve the Contractor from responsibility to perform this Contract, or from liability for any defect in the Works arising from compliance with the Building Code.
- 1.1.26. The Contractor must notify the ABCC of any breach or suspected breach of the Building Code as soon as practicable but no later than 2 working days after becoming aware of the breach or suspected breach and of the steps proposed to be taken to rectify the breach.
- 1.1.27. The Contractor acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code and will ensure that it and its Subcontractors comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the Act, requests to interview any person under section 74 of the Act, requests to produce records or documents under sections 74 and 77 of the Act and responding to requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
- 1.1.28. The Contractor must only enter into a subcontract for any of the Works where:
 - a. The subcontractor is not covered by, and does not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code;
 - b. The subcontractor is not subject to an exclusion sanction or is excluded from undertaking work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner;
- 1.1.29. The Contractor must ensure as far as is reasonably practicable that subcontractors that are engaged by the Contractor in respect of the Works take remedial action to rectify non-compliant behaviour.
- 1.1.30. The Contractor must only enter into a subcontract for any of the Works where:
 - a. The Subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code (located in Part 4 in the document titled *Model Clauses Type B-Indirectly Funded* available on the ABCC website (www.abcc.gov.au)); and
 - b. the subcontract with the Subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code (located in Part 5 in the document titled *Model Clauses Type B-Indirectly Funded* available on the ABCC website (www.abcc.gov.au)).
- 1.1.31. **[Note: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice].** The Contractor must

only use products in building work that comply with the relevant Australian standards published by, or on behalf, Standards Australia.

- 1.1.32.** *[Note: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice]* The Contractor must ensure that any agreement entered into in relation to the Works with a Subcontractor requires the Subcontractor to only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia