



Australian Government
**Australian Building and
Construction Commission**

Code for the Tendering and Performance of Building Work 2016

Model Clauses Type B

Model Clauses for Tender and Contract Documentation for Contractors and Subcontractors

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1. Purpose

Contractors, that are building contractors or building industry participants, who are subcontracting Commonwealth funded building work are responsible for ensuring all expressions of interest, tenders and contractual documentation are consistent with the requirements of the *Code for the Tendering and Performance of Building Work 2016* (Building Code). All subcontractors invited to express interest in, or tender for, Commonwealth funded building work, must be informed of the application of the Building Code to the work.

This document contains model clauses that can be used in expression of interest or tender documentation (however described) and subcontracts issued by contractors who are subcontracting Commonwealth funded building work to ensure application of the Building Code.

The model clauses contained in this document can be used by contractors on either directly or indirectly funded Commonwealth building work.

Where indicated in this document, contractors may choose to remove certain clauses when undertaking building work that is **indirectly** funded by the Commonwealth. Clauses of this kind are not required by the Building Code on indirectly Commonwealth funded building work. However, contractors may still choose to include them as a matter of best practice.

In the model clauses, the following terms are used:

- 'Works' is used to refer to the Commonwealth funded building work being undertaken by the Contractor
- 'Contractor' is used to refer to the building contractor or building industry participant who has entered the contract with the Commonwealth funding entity for the Works
- 'Subcontractor' is used to refer to any building contractor or building industry participant who enters into a contract with the Contractor in relation to the Works
- 'Subcontract' is used to refer to a contract between the Contractor and a Subcontractor
- 'Sub-subcontractor' is used to refer to any building contractor or building industry participant who enters into a contract with a Subcontractor in relation to the Works.

The Building Code can be downloaded from:
<https://www.legislation.gov.au/Details/F2017C00668>

2. Advertisement clause

The clause below should be used by building contractors and building participants when they release advertisements calling for expressions of interest or requests for tender (however described) for the purposes of subcontracting Commonwealth Funded Building Work:

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*.

3. Tender clauses

The clauses below should be used when a code covered entity releases an expression of interest or tender documentation (however described) for the purposes of subcontracting Commonwealth Funded Building Work.

Where indicated below, contractors may remove certain sections of the clauses as the content of these clauses is not required under the Building Code on indirectly Commonwealth funded work. Such clauses may be included however, as a matter of best practice.

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/F2017C00668 .
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 Commonwealth Funded Building Work that is the subject of this Request for Tender.

1.1.2. The Building Code applies to the Works.

1.1.3. Any person responding to this [expression of interest/tender] must comply with the Building Code and meet the eligibility requirements set out in section 23 of the Building Code at the time of lodgement.

1.1.4. As part of their tender, Tenderers must submit:

- a. a signed "Declaration of Compliance" which is attached to this Request for Tender; and

- b. the further information outlined in Attachment A to the “Declaration of Compliance”.

1.1.5. The Contractor will only enter into a subcontract in relation to the Works if:

- a. the successful Tenderer and its Related Entities are not covered by an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code;
- b. the successful Tenderer is not subject to an Exclusion Sanction or excluded from undertaking work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner;
- c. the successful Tenderer will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia *[NOTE: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice].*

1.1.6. The Contractor will exclude Tenderers from further consideration if at any time before a subcontract is executed in relation to the Works the Contractor considers that they do not comply with the requirements in clause 1.1.5.

4. Declaration of Compliance

The Declaration of Compliance below should be completed by any Subcontractor before a code covered entity enters into a subcontract for Commonwealth Funded Building Work. In addition, it should be included as an attachment to any expression of interest or tender documentation (however described) a code covered entity releases for the purposes of subcontracting Commonwealth Funded Building Work. The appropriate terminology should be selected in the below Declaration of Compliance to reflect whether it is provided as part of a tender or before a subcontract is entered into.

Contractors should require Subcontractors to produce a copy of the ABCC Letter of Compliance (Determination)¹ or a completed Self-Declaration A or C in respect of the enterprise agreement or other industrial instrument that covers the Subcontractor in relation to the Works. Subcontractors are also required to complete Section Two of Attachment A outlining details of any other enterprise agreements made or varied (in accordance with section 207 of the *Fair Work Act 2009*) on or after 25 April 2014, that cover the Subcontractor or their Related Entities in respect of building work.

Where indicated below, contractors may remove certain sections of the clauses on indirectly Commonwealth funded work. Such clauses may be included however, as a matter of best practice.

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

1.1.1. 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/F2017C00668 .
Building Contractor	has the same meaning as in the Act.
Building Industry Participant	has the same meaning as in the Act.

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- ¹ Transitional ABCC Letters of Compliance for enterprise agreements made before 2 December 2016 are no longer valid. Contractors can identify when a Letter of Compliance is a transitional Letter of Compliance because it states that the contractor is eligible to tender until 29 November 2018.

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.
Sub-subcontractor	means a Building Contractor or Building Industry Participant who the Subcontractor has entered, or proposes to enter, into a sub-subcontract with to undertake any of the Works.
Works	means the Commonwealth Funded Building Work that is [proposed to be the subject of a subcontract with the Contractor/the subject of this Request for Tender].

Name of Works or project to which the Works relate:

Name of [Subcontractor/Tenderer], ABN and ACN:

- 1.1.2. The [Subcontractor/Tenderer] acknowledges that it and its Related Entities must comply with the Building Code in relation to all Building Work described in Schedule 1 of the Building Code for which an expression of interest or request for tender (however described) is called on or after the date that the Building Code commenced, being 2 December 2016, and, [should it be the successful Tenderer], in relation to the Works.
- 1.1.3. The [Subcontractor/Tenderer] undertakes to ensure that it and its Sub-subcontractors, [should it be the successful Tenderer,] comply with the Building Code.
- 1.1.4. The [Subcontractor/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 Sub-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.

- 1.1.5. The [Subcontractor/Tenderer] declares that where it proposes to sub-subcontract any of the Works, [should it be the successful Tenderer], it will:
- a. not enter into a sub-subcontract with a Sub-subcontractor who:
 - 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;
 - ii. is subject to an Exclusion Sanction; or
 - iii. unless approved otherwise by the ABC Commissioner, is excluded from performing Building Work funded by a state or territory government; and
 - b. only enter into a sub-subcontract where:
 - i. the Sub-subcontractor undertakes 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: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice];

To be included where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).

ii. the Sub-subcontractor undertakes to comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Works;
 - iii. the Sub-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; and
 - iv. the sub-subcontract with the Sub-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, available on the ABCC website (www.abcc.gov.au)).
- 1.1.6. The [Subcontractor/Tenderer] declares that it has provided all of the further information required by Attachment A to this Declaration of Compliance.
- 1.1.7. The [Subcontractor/Tenderer] declares that:
- a. It, and its Related Entities, are not covered by an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code ([Subcontractor/Tenderer] must complete Section Two of Attachment A);

- b. it is not subject to an Exclusion Sanction;
- c. 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, should it be the successful Tenderer *[NOTE: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice]*; and

To be included where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).

- d. *it will comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Works, should it be the successful Tenderer.*

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

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

The following information must be provided as part of the 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.

Item	Requirement	Compliance
1	Does the [Subcontractor/Tenderer] , or its Related Entities, have an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code?	<p>Yes / No</p> <p>Details: complete Section Two of this Attachment A and attach the required evidence according to the Subcontractor/Tenderer's situation. Refer to the ABCC's 'eligibility to tender' webpage at http://www.abcc.gov.au/buildingcode/eligibility-tender for further information.</p>
2	Is the [Subcontractor/Tenderer] excluded from performing Building Work funded by a state or territory government? If so, the Contractor reserves the right to exclude the [Subcontractor/Tenderer] from further consideration.	<p>Yes / No</p> <p>Details:</p>
<p>[NOTE: Items 3-5 in the table below are not required on indirectly Commonwealth funded building work but may be included as a matter of best practice]</p>		
3	Has the [Subcontractor/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	<p>Yes / No</p> <p>Details:</p>

	law or the <i>Migration Act 1958</i> ?	
4	Has the [Subcontractor/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?	Yes / No
		Details:
5	Has the [Subcontractor/Tenderer] or its Related Entities within the preceding 3 years owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant?	Yes / No
		Details:

Section Two– required for tender responses (however described)

Does the [Subcontractor/Tenderer], or its Related Entities, have an enterprise agreement(s) made or varied (in accordance with section 207 of the *Fair Work Act 2009*) on or after 25 April 2014 that cover the Subcontractor/Tenderer or its Related Entities in respect of building work?

No - The [Subcontractor/Tenderer] must attach Self-Declaration A

Yes - The [Subcontractor/Tenderer] must attach the ABCC letter of Compliance or Self-Declaration that relates to the project being tendered; and

The [Subcontractor/Tenderer] must list all enterprise agreements made or varied (in accordance with section 207 of the *Fair Work Act 2009*) on or after 25 April 2014 that cover the [Subcontractor/Tenderer] or its Related Entities in respect of building work.

<i>Name of entity covered by the enterprise agreement</i>	<i>Title of enterprise agreement that covers the Subcontractor/Tenderer or its Related Entities in respect of building work</i>	<i>Date made or varied (in accordance with section 207 of the Fair Work Act 2009)</i>	<i>Fair Work Commission Reference</i>	<i>Does the entity have an ABCC Letter of Compliance (Determination)² in relation to the agreement</i> YES/NO	<i>If NO Is the entity entitled to an exemption* outlined in Schedule 5 of the Building Code 2016 in relation to the enterprise agreement</i>

• Schedule 5 to the Building Code sets out a number of transitional matters that impact whether or not an enterprise agreement that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, meets the requirements of the Building Code. An explanation of these matters can be located on the 'Eligibility to Tender' page on the ABCC website (www.abcc.gov.au). It is advisable to have regard to these matters when completing the table above.

² Transitional ABCC Letters of Compliance for enterprise agreements made before 2 December 2016 are no longer valid. Contractors can identify when a Letter of Compliance is a transitional Letter of Compliance because it states that the contractor is eligible to tender until 29 November 2018.

5. Contract clauses - agreements with Subcontractors

The clauses below should be used by building contractors and building industry participants in subcontracts with Subcontractors in relation to Commonwealth Funded Building Work.

Where indicated below, contractors may remove certain sections of the clauses on indirectly Commonwealth funded work. Such clauses may be included however, as a matter of best practice. **COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016**

1.1.8. 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/F2017C00668 .
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.
Sub-subcontractor	means a Building Contractor or Building Industry Participant who the Subcontractor has entered, or proposes to enter, into a sub-subcontract with to undertake any of the Works.
Works	means Commonwealth Funded Building Work that is the subject of this Subcontract.

1.1.9. The Subcontractor declares as at the date of commencement of this Contract in relation to the Works, that it:

- a. is not subject to an Exclusion Sanction; and
- b. unless approved otherwise by the ABC Commissioner, is not excluded from performing Building Work funded by a state or territory government.
- c. 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;

1.1.10. The Subcontractor:

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

that it and its Sub-subcontractors:

- c. comply with the Building Code;
- d. will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia
[NOTE: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice];

To be included where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).

- e. *comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Works.*

1.1.11. Without limiting and notwithstanding clause 1.1.10.c, the Subcontractor will ensure that remedial action is taken to rectify any behaviour on the part of it and its Sub-subcontractors that is non-compliant with the Building Code.

1.1.12. The Subcontractor must every six months during the term of this Subcontract advise the Contractor whether:

- a. it has in the preceding 6 months or since it last advised the Contractor, whichever is the earliest, 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 Migration Act 1958*; or
- b. it has in the preceding 6 months or since it last advised the Contractor, whichever is the earliest:
 - i. 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; or

- ii. owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant.

[NOTE: This clause is not required on indirectly Commonwealth funded building work but may be included as a matter of best practice]

- 1.1.13. Compliance with the Building Code does not relieve the Subcontractor from responsibility to perform this Subcontract, or from liability for any defect in the Works arising from compliance with the Building Code.
 - 1.1.14. The Subcontractor 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.
 - 1.1.15. The Subcontractor 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 Sub-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 of the Act and responding to requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
 - 1.1.16. The Subcontractor must only enter into a sub-subcontract for any of the Works where:
 - a. the Sub-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, available on the ABCC website (www.abcc.gov.au)); and
 - b. the sub-subcontract with the Sub-subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code.
 - 1.1.17. The Subcontractor must ensure that it and its Sub-subcontractor comply with clauses contained in the sub-subcontract referred to in clause 1.1.16.b.
-