



Australian Government

**Australian Building and
Construction Commission**

These clauses are for use by subcontractors who are building contractors or building industry participants calling for expressions of interest or tenders (howsoever described) in relation to Commonwealth funded building work where the head contractor who engaged them continues to be subject to the Building Code 2013 for the project.

A head contractor continues to be subject to the Building Code 2013 on a project for Commonwealth funded building work if they tendered for the project before 2 December 2016.

A subcontractor is subject to the Code for the Tendering and Performance of Commonwealth Funded Building Work 2016 if they submitted an expression of interest or tender for Commonwealth funded building work on or after 2 December 2016.

Model Clauses Type C

Code for the Tendering and Performance of Building Work 2016

Model Clauses for Code Covered Entities when engaging Subcontractors on Head Contractor Building Code 2013 Projects

1 September 2017

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1. Purpose

Head contractors who have been engaged to undertake building work in relation to a Commonwealth funded building project who submitted a tender in relation to that building work prior to 2 December 2016 continue to be subject to the Building Code 2013. If those head contractors call for an expression of interest or tender (however described) for the purposes of subcontracting some of that building work on or after 2 December 2016, the building contractors or building industry participants who submit an expression of interest or tender (however described) in response become subject to the *Code for the Tendering and Performance of Building Work 2016* (Building Code 2016).

This document contains model clauses that can be used by those building contractors or building industry participants who are subject to Building Code 2016 when they are further subcontracting any of that work.

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 clearly set out the requirements of the Building Code 2016.

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 into a subcontract in relation to the Works with a head contractor who continues to be subject to the Building Code 2013
- 'Subcontract' is used to refer to a contract between the Contractor and the Subcontractor
- '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
- '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 2016 can be downloaded from:
<https://www.legislation.gov.au/Details/F2017C00668>

2. Advertisement clause

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

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

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 Contractor releases an expression of interest or tender documentation (however described) for the purposes of further subcontracting Commonwealth Funded Building Work:

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

1.1.1. In these clauses:

ABC Commissioner	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
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 2016	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 2016.
Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code 2016.
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 2016.
Related Entity	has the same meaning as in subsection 3(2) of the Building Code 2016.
Works	means Commonwealth Funded Building Work that is the subject of this Request for Tender.

1.1.2. The Building Code 2016 applies to the Works.

1.1.3. As part of their tender, Tenderers must submit a signed “Declaration of Compliance” which is attached to this Request for Tender.

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

- 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 2016; and
- the successful Tenderer is not subject to an Exclusion Sanction.

- 1.1.5. 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 1.1.4.
 - 1.1.6. The Contractor may exclude Tenderers from further consideration if at any time before a contract is executed in relation to the Works they are excluded from performing Building Work funded by a state or territory government, unless approval otherwise is given by the ABC Commissioner.
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4. Declaration of Compliance

The Declaration of Compliance below should be completed by any Subcontractor before a Contractor enters into a further subcontract for Commonwealth Funded Building Work with the Subcontractor. In addition, it should be included as an attachment to any expression of interest or tender documentation (however described) a Contractor releases for the purposes of further 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 building work on the Project. Subcontractors are also required to complete 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.

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 2016	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 2016.

¹ Transitional ABCC Letters of Compliance for enterprise agreements made before 29 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.

Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code 2016.
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 2016.
Related Entity	has the same meaning as in subsection 3(2) of the Building Code 2016.
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 2016 in relation to all Building Work described in Schedule 1 of the Building Code 2016 for which an expression of interest or request for tender (however described) is called on or after the date that the Building Code 2016 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 2016.
- 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 2016 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 requests for information concerning matters relating to the Building Code 2016 under subsection 7(c) of the Building Code 2016.
- 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 2016;
 - 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 has submitted a declaration of compliance in substantively the same form as the model declaration of compliance applicable to the Subcontractor in relation to the Building Code 2016; and
 - ii. the sub-subcontract with the Sub-subcontractor contains clauses in substantively the same form as the model contract clauses applicable to the Subcontractor in relation to the Building Code 2016.

1.1.6. 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 2016 ([Subcontractor/Tenderer] must complete Attachment A);
- b. it is not subject to an Exclusion Sanction; and
- c. unless approved otherwise by the ABC Commissioner, is not excluded from performing Building Work funded by a state or territory government.

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

Attachment A– 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.

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

- Schedule 5(1)(1)(b) and (c) provide that subsection 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement made before 2 December 2016 that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, to the extent that the requirements in those subsections must be met for the purposes of:
 - (b) the awarding, before 29 November 2018, of building work relating to an expression of interest or tender lodged by the contractor or participant in the period beginning on 2 December 2016 and ending at the commencement of the Building and Construction Industry (Improving Productivity) Amendment Act 2017 (the Amendment Act commencement); or
 - (c) the undertaking of building work referred to in paragraph (b).
- Schedule 5(1)(1)(2)(a) provides that subsections 11(1) and 11(3) and 15(1) do not apply in relation to an enterprise agreement that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, if:
 - (a) the enterprise agreement :
 - (i) was made before 2 December 2016; and
 - (ii) applies to the contractor, participant or related entity in respect only of building work relating to an expression of interest or tender lodged by the contractor or participant before 2 December 2016.

5. Contract clauses - agreements with Subcontractors

The clauses below should be used by Contractors in subcontracts with Subcontractors in relation to Commonwealth Funded Building Work.

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.
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 2016	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 2016.
Commonwealth Funded Building Work	means Building Work in items 1-8 of Schedule 1 of the Building Code 2016.
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 2016.
Related Entity	has the same meaning as in subsection 3(2) of the Building Code 2016.
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.

1.1.2. The Subcontractor declares as at the date of commencement of this Contract in relation to the Works, that it and its Sub-subcontractors:

- a. are not subject to an Exclusion Sanction; and

- b. unless approved otherwise by the ABC Commissioner, are not excluded from performing Building Work funded by a state or territory government.

1.1.3. 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 2016; and
- d. are not covered by, and do not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code 2016.

1.1.4. Without limiting and notwithstanding clause 1.1.3.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 2016.

1.1.5. Compliance with the Building Code 2016 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 2016.

1.1.6. The Subcontractor must notify the ABCC of any breach or suspected breach of the Building Code 2016 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.

1.1.7. The Subcontractor acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code 2016 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 Act and requests for information concerning matters relating to the Building Code 2016 under subsection 7(c) of the Building Code 2016.

1.1.8. The Subcontractor must only enter into a sub-subcontract for any of the Works where the sub-subcontract with the Sub-subcontractor contains clauses in substantively the same form as the model contract clauses applicable to the Subcontractor in relation to the Building Code 2016.

1.1.9. The Subcontractor must ensure that it and its Sub-subcontractors comply with clauses contained in the sub-subcontract referred to in clause 1.1.8.

ⁱ 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.