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fact sheet

August 2021

Code for the Tendering and Performance of Building Work 2016 (the Building Code)

What is the Building Code?

The Building Code is a legislative instrument issued under the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**Act**), which sets out certain requirements for 'building contractors' and 'building industry participants' who have tendered for Commonwealth Funded Building Work (**Code Covered Entities**).

The Building Code also imposes obligations on non-corporate Commonwealth entities (**Funding Entities**)¹ when procuring or funding building work. The Building Code is a 'procurement-connected policy' for the purpose of the Commonwealth Procurement Rules and RMG 415 (Commonwealth Grants and Procurement Connected Policies).

Every 'building contractor' or 'building industry participant' which has submitted an expression of interest or tender (however described) for Commonwealth Funded Building Work from 2 December 2016 is a Code Covered Entity and is subject to the Building Code.

The Australian Building and Construction Commission (the **ABCC**) is the entity responsible for monitoring compliance with the Building Code.

The Building Code places a number of obligations on Code Covered Entities. These include obligations with regard to:

Engaging subcontractors (section 8)	Engaging non-citizens and non-residents (section 11F)
Compliance with laws (section 9)	Above-entitlement payments (section 12)
Registration of agreements (section 10)	Freedom of association (section 13)
Prohibited conduct (section 11)	Right of entry (section 14)
Sham contracting (section 11B)	Enterprise agreements (section 15)
Collusive tendering (section 11C)	Reporting (sections 16 and 17)
Security of payment (section 11D)	Drug and alcohol testing (section 16A)
Disputed payments (section 11E)	Workplace Relations Management Plans (Section 32, Schedule 2, Schedule 3)

¹ Section 4 of the Building Code allows the Minister for Finance to specify that certain corporate Commonwealth entities are Funding Entities for the purpose of the Building Code. No corporate Commonwealth entities are currently specified, and corporate Commonwealth entities should not apply the Building Code.

What is Building Work for the purposes of the Building Code?

The Building Code only applies to 'Building Work' as defined in section 3(4) of the Building Code. Building Work includes the construction, alteration, extension, restoration, repair, demolition and dismantling of structures that form, or are to form, part of land.

Building Work also includes the installation or removal of fittings from such structures, and preparatory works (e.g. site clearing and excavation).

The scope of Building Work is very broad, but there are limited exemptions for certain mining operations, the construction of single dwelling houses, the transporting of goods to building sites, and the off-site prefabrication of made-to-order components.

What is Commonwealth Funded Building Work?

Commonwealth Funded Building Work is defined at Schedule 1 of the Building Code, and includes:

- a) Building Work (of any value) undertaken for, or on behalf of, a Funding Entity;
- b) Building Work indirectly funded by the Commonwealth by a grant or other program, where the Commonwealth's contribution either exceeds \$5 million and represents at least 50% of the total project value, or exceeds \$10 million (regardless of total value);
- c) certain BOOT, BOO, PPP, and PFI projects; and
- d) Building Work that involves a pre-commitment lease (also known as an agreement for lease).

Commonwealth Funded Building Work does not include privately funded Building Work, or certain work undertaken to support the operations of security or intelligence agencies.

What are the obligations on Funding Entities?

When drafting requests for tender and requests for expressions of interest

When procuring Commonwealth Funded Building Work, Funding Entities must ensure that any requests for expressions of interest or request for tender require respondents to:

- a) confirm the respondent (and any related entity) will comply with the Building Code;
- b) confirm the respondent is eligible to perform Commonwealth Funded Building Work;
- c) demonstrate a positive commitment to the provision of appropriate training and skill development for the respondent's workforce;
- d) confirm the number of apprentice and trainee employees, and the number and classes of persons that hold visas, that are intended to be engaged by the respondent to undertake the Commonwealth Funded Building Work; and
- e) advise if the respondent has, within the preceding 3 years, had an adverse decision made against them for breach of a WHS or building law, been required to pay any amount under an adjudication certificate, or owed an unsatisfied judgment debt to a building contractor or building industry participant.

Funding Entities must also ensure that (prior to contract execution) preferred tenderers provide certain information, including:

- a) the amount of domestically sourced and manufactured materials that will be used, and whether the materials to be used comply with relevant Australian Standards;
- b) the whole of life costs of the project to which the Building Work relates; and
- c) the project's impact on jobs, and whether the project will contribute to skills growth.

Funding Entities must also ensure a Workplace Relations Management Plan (**WRMP**) is required in all requests for tenders or expressions of interest for work specified in Schedule 2 of the Building Code. This includes Building Work for which the Commonwealth's contribution exceeds \$5 million and represents at least 50% of the total project value, and all Building Work for which the Commonwealth's contribution exceeds \$10 million.

Where a WRMP is required, Funding Entities must notify the ABCC as soon as practicable after requests for tenders or expressions of interest are issued, and must provide to the ABCC the WRMP of each respondent that the Funding Entity proposes to shortlist. Funding Entities must not award a contract to a respondent unless the respondent's WRMP has been approved by the ABCC.

When awarding contracts for Commonwealth Funded Building Work

Funding Entities must not enter into contracts for Commonwealth Funded Building Work with contractors which:

- a) are covered by enterprise agreements which include clauses that purport to impose limits on the right of the contractor to manage or improve its business, discriminate against persons, classes of employees or subcontractors or are inconsistent with certain freedoms of association;
- b) are subject to an exclusion sanction under the Building Code, or are excluded from performing work funded by a state or territory government (unless approval to do so is provided by the ABC Commissioner);
- c) have not satisfied the Funding Entity that the contractor will comply with the Building Code; or
- d) have an unsatisfied adverse decision made by a court or tribunal for a breach of the Act or certain other laws, including the *Fair Work Act 2009* (Cth), work health and safety laws, and competition and consumer laws.

Funding Entities must notify the ABCC when a head contract (i.e. not including a subcontract) for Commonwealth Funded Building Work has been awarded. Funding Entities must also notify the ABCC of any allegations of breaches of the Building Code.

What are the consequences for not complying with the Building Code?

Where the ABCC considers that a Funding Entity or official is not complying with the Building Code, the ABCC may refer the matter or make a complaint to the Department of Finance.

How best to ensure compliance with the Building Code?

The ABCC provides model clauses which can be used by Funding Entities in preparing procurement documentation and contracts, to ensure compliance with the Building Code. These clauses (amongst other things) address compliance with the requirements on Funding Entities set out above.

AGS can also assist funding entities in ensuring compliance with the Building Code throughout project procurement and execution.

More information

If you require further information about the Building Code please contact:

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