



PRACTICE NOTE NO. 8a

July 1996

**CODE OF PRACTICE
AND
CODE OF TENDERING
FOR THE CONSTRUCTION INDUSTRY**

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DEPARTMENT OF LOCAL GOVERNMENT



Practice Note No 8a
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AND
CODE OF TENDERING
FOR THE CONSTRUCTION INDUSTRY**

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Department of Local Government

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Practice Note No 8 outlined the range of measures, known as the *Code of Tendering* and the *Code of Practice for the Construction Industry*, which were developed by the NSW Government to optimise relationships between government bodies and the construction industry to overcome illegal activities and guard against questionable practices.

These Codes have now been revised and clarified. The updated versions appear in a form appropriate for local government in this Practice Note.

The Codes apply to all government building, construction, maintenance and material supply contracts, consultant commissions and government funded projects and sites within the construction industry in New South Wales.

They will apply to all contracts and projects in respect of which tenders are invited from 1 July 1996.

Any inquiries concerning the Codes should be referred to

**The Executive Director,
Construction Policy Steering Committee,
Level 23, McKell Building,
Rawson Place,
SYDNEY NSW 2000
Ph 02 9372 8885, Fax 02 9372 8822.**

Copies of the *Implementation Guidelines for the Code of Practice and Code of Tendering* may also be obtained from this address.

Disclaimer

All due care has been taken in preparing and checking this information document. The Department of Local Government emphasises that the document is the Department's view only and should not be relied upon in any relevant legal proceedings. A council or other parties should be guided by their own legal advice.

CONTENTS

CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY	5
CODE OF TENDERING FOR THE CONSTRUCTION INDUSTRY	31

CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY

CODE OF PRACTICE - CONTENTS

1. INTRODUCTION	9
1.1 OBJECTIVES	10
1.2 DEFINITIONS	11
1.3 IMPLEMENTATION	13
1.4 CONSULTATION	13
2. ROLES	13
2.1 GOVERNMENT AGENCIES AS CLIENTS	13
2.2 CONTRACTORS, SUBCONTRACTORS, CONSULTANTS, SUPPLIERS	14
2.3 EMPLOYER AND INDUSTRY ASSOCIATIONS	15
2.4 UNIONS	15
3. TENDERING ETHICS	16
3.1 ETHICAL PRINCIPLES	16
3.2 PROHIBITED COLLUSIVE PRACTICES	17
4. CONTINUOUS IMPROVEMENT AND BEST PRACTICE	18
4.1 COMMITMENT	18
4.2 SECURITY OF PAYMENT	18
4.3 COOPERATIVE CONTRACTING	19
4.4 PROJECT PLANNING	19
4.5 CONTRACT MANAGEMENT	20
5. WORKPLACE REFORM	21
5.1 SCOPE	21
5.2 TRAINING AND SKILL FORMATION	21
6. OCCUPATIONAL HEALTH SAFETY & REHABILITATION (OHS&R)	22
6.1 OBLIGATIONS	22
6.2 OHS&R TRAINING	22
6.3 OCCUPATIONAL HEALTH AND SAFETY DISPUTES	23
7. INDUSTRIAL RELATIONS	24
7.1 AWARDS AND LEGAL OBLIGATIONS RELATING TO EMPLOYMENT	24
7.2 ENTERPRISE AGREEMENTS	24
7.3 OVERAWARD PAYMENTS	25
7.4 PROJECT AGREEMENTS	25
7.5 SITE ALLOWANCES	26
7.6 MEMBERSHIP OF REGISTERED ORGANISATIONS	26
7.7 DISPUTE SETTLEMENT	26
7.8 STRIKE PAY	27
7.9 INDUSTRIAL IMPACTS	27
8. COMPLIANCE	27
8.1 NSW GOVERNMENT POLICY	27
8.2 ENFORCEMENT	28
8.3 ROLE OF INDUSTRY	29

1. Introduction

The New South Wales Government has a long term commitment to reform the construction industry within New South Wales. This commitment embraces a wide range of initiatives covering tendering ethics; best practice; workplace reform; industrial relations; occupational health, safety and rehabilitation; environmental management; legislative and administrative reform; law enforcement and industry consultation.

This *Code of Practice* and the *Code of Tendering* apply to all Government building, construction, maintenance and material supply contracts, consultant commissions and government funded projects and sites. This includes projects involving private sector participation in the provision of the State's assets, for example by way of Build/Own/Operate (BOO) schemes and similar arrangements.

The Codes establish the principles and standards of behaviour which must be observed by any contractor, subcontractor, consultant and supplier wishing to do business with the Government, or working on projects to which the Codes apply, including those with private sector funding.

The Codes also outline what is expected of public sector clients in their dealings with the industry and what is expected of employer and industry associations and unions operating in the construction industry.

The Codes, as part of the overall strategy, aim to increase industry competitiveness, cooperation and productivity, and should be seen as a suitable benchmark for all participants in the construction industry. The Government will be strongly promoting the widespread adoption of the Codes.

The *Implementation Guidelines* expand on key aspects of the Codes and should be read together with the *Code of Practice* and the *Code of Tendering*.

The New South Wales Government *Capital Project Procurement Manual* is also an essential reference. The Manual provides integrated packages of initiatives and linkages directed at reform of the construction industry and ensures there is a coordinated approach to the implementation of the reforms.

Both the *Implementation Guidelines* and the *Capital Project Procurement Manual* can be obtained from the Construction Policy Steering Committee.

Any enquires concerning this Code or the *Code of Tendering* should be referred by industry participants to the appropriate government agency or the Construction Policy Steering Committee (CPSC) Secretariat. Public sector organisations should refer directly to the CPSC Secretariat

**The Executive Director,
Construction Policy Steering Committee,
Level 23, McKell Building,
Rawson Place,
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Ph 02 9372 8885, Fax 02 9372 8822.**

1.1 Objectives

The Code:

- ◆ promotes action to improve efficiency and productivity to the benefit of all industry parties and elimination of short-term expedient decision-making and similar unsatisfactory practices
- ◆ is aimed at achieving best practice, workplace reform, improved industrial relations, high standards in occupational health safety and rehabilitation (OHS&R) performance and in environmental management within the construction industry in New South Wales
- ◆ is part of the State's contribution to making the industry robust and internationally competitive
- ◆ sets down standards the New South Wales Government, councils and county councils demand as clients
- ◆ sets down standards the New South Wales Government expects of individual government agencies, including councils and county councils, when dealing with the construction industry
- ◆ is aimed at promoting the highest standards within the construction industry by seeking, from those who are a party to the Code, a commitment to comply with the full spirit and intent of all laws and regulations that impact upon the construction industry
- ◆ seeks to ensure that all those involved in the construction industry comply with applicable awards and/or enterprise or project agreements and legislative obligations relating to employment

- ◆ seeks a commitment from contractors, subcontractors, consultants and suppliers to comply with the NSW Government's training, skill formation and equal employment opportunity policies and maintain high standards in OHS&R as well as environmental management
- ◆ seeks a commitment from unions, employer and industry associations to promote and comply with the Code and the full spirit and intent of all laws and regulations that impact on the construction industry.

The achievement of these objectives will reduce costs and increase the value obtained from the State's and local government's capital investment.

1.2 Definitions

'Award' legally enforceable determination made by the Australian and/or NSW Industrial Relations Commission containing the minimum terms and conditions of employment to be met by the relevant employer.

'Affirmative Action' policy that is intended to redress discriminatory practices, especially in regard to employment. The policy is commonly used as a means of redressing gender-bias, sexual preference, disability, or racial discrimination.

'Client(s)' parties receiving tenders, including councils and county councils.

'Consultant' professional or organisation providing design, management, cost or other services for a Principal, contractor, subcontractor, consultant, client or supplier.

'Construction industry' includes all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

'Contractor' individual or organisation responsible for the performance of the work specified under a contract.

'Employer Association' association whose membership generally consists of employers who operate in the construction or related industries and which is registered under the Australian and/or NSW Industrial Relations Acts.

'Enterprise Agreement' agreement applying to an enterprise or bargaining unit which has been given legal force under the Australian and/or NSW Industrial Relations Acts.

CODE OF PRACTICE - INTRODUCTION

‘Fairness’ means objective, reasonable and even-handed. Being fair does not mean satisfying everyone. It can be unfortunate, but not unfair, that people may be adversely affected by decisions.

‘Industry Association’ organisation representing the professional and/or trade or commercial interests of members in the construction or related industries.

‘Industry Code of Practice’ Code, which has been approved by the Minister for Industrial Relations, and is a practical guide to achieving the standard of health and safety required by the *Occupational Health and Safety Act, 1983* (and Regulations) for a particular area of work.

‘Overaward payment’ payment and/or benefit including superannuation above that set out in the relevant award and/or legislation.

‘Principal’ the person, entity or organisation responsible for contracting with a contractor or consultant for the carrying out of the work for the carrying out of work.

‘Site Allowance’ award made by the NSW Industrial Relations Commission to provide compensation to affected employees engaged at a particular work site if they encounter conditions so far removed from the type of conditions ordinarily experienced on construction sites as to warrant extra compensation. *Ref: Transbridge Pty Ltd, Nepean River Bridge, Menangle Award Appeal, 31 May 1979; Copper Bella Site, Full Bench Decision, 17 October 1989*

‘Service Provider’ includes: contractors, subcontractors, consultants and suppliers.

‘Subcontractor’ party that provides a service and/ or product to a contractor and/or subcontractor or client.

‘Supplier’ party that provides a product and/or service to a client.

‘Tenders’ prices, bids, quotations and consultant proposals.

‘Tenderers’ parties submitting tenders.

‘Union’ organisation of employees working in the construction or related industries and which is registered under the Australian and/or NSW Industrial Relations Acts, and includes the Labor Council of New South Wales as the State’s peak council for employees.

‘Value for money’ is determined by considering all the factors which are relevant to a particular purpose, for example: experience, quality, reliability, timeliness, service, initial and ongoing costs, are all factors which can make a significant impact on benefits and costs. Value for money does not automatically mean the ‘lowest price’. It is important to be clear about how value for money will be determined in any particular set of circumstances prior to assessing bids.

1.3 Implementation

This Code will take effect on all new contracts and projects in respect of which tenders are invited from 1 July 1996.

The *Code of Practice for the Construction Industry* contained in Practice Note No 8 will continue to apply on existing projects and/or projects for which tenders were called prior to 1 July 1996.

1.4 Consultation

A formal consultative process will be established with key industry participants to discuss issues arising from the implementation of the Code.

The Code will be reviewed from time to time in order to ensure that the primary objectives set out in the Code are appropriate to the prevailing environment. Industry participants will be consulted in the course of such reviews.

2. Roles

Good working relationships between clients and service providers (contractors, subcontractors, consultants, suppliers and their respective employees and applicable unions) will be built on trust and cooperation rather than mistrust and confrontation.

This means that government agencies will look to service providers who are able to work in a cooperative environment.

2.1 Government Agencies as Clients

Government agencies, their employees and/or agents will observe the following standards of behaviour:

- ◆ comply with the principles, ethics and procedures in the *Code of Practice* and the *Code of Tendering*
- ◆ adopt a cooperative (nonadversarial) approach in all business dealings including contract management
- ◆ ensure timeliness in all transactions
- ◆ maintain confidentiality, particularly in connection with commercial issues
- ◆ promote and strive to achieve best practice
- ◆ establish internal mechanisms to deal with transgressions from this Code or the *Code of Tendering*.

2.2 Contractors, Subcontractors, Consultants, Suppliers

All service providers are required to:

- ◆ adopt a cooperative (non adversarial) approach which must extend to all relationships in all combinations, and at all levels. For example, between: client, contractor, and consultant; contractor, subcontractor, consultant and supplier; subcontractor, subcontractor, supplier; employer, employees and applicable unions, etc.
- ◆ improve skills, financial planning, management and business efficiency
- ◆ maintain high standards in OHS&R and environmental management
- ◆ manage day to day industrial relations and ensure that employees are treated fairly and equitably
- ◆ strive to achieve international best practice
- ◆ comply with the ethics and procedures outlined in the *Code of Tendering*
- ◆ operate within the law and comply with the standards of behaviour in this Code, and
- ◆ establish internal mechanisms to deal with transgressions from this Code or the *Code of Tendering*
- ◆ comply with obligations in the *Occupational Health and Safety Act 1983* (and Regulations) as well as the relevant safety procedures in industry codes of practice, applicable awards and/or enterprise or project agreements.

2.3 Employer and Industry Associations

All employer and industry associations are required to:

- ◆ communicate honestly with government agencies, unions and other industry participants
- ◆ cooperate with the government, contractors, subcontractors, consultants, suppliers and unions in industry reform aimed at improving: relationships, efficiency, productivity, OHS&R performance, and competitiveness in the construction industry
- ◆ encourage compliance by members with this Code and the *Code of Tendering*
- ◆ promote to members compliance with the provisions of applicable awards and/or enterprise or project agreements, dispute settlement procedures, all orders, formal directions and decisions of any court of competent jurisdiction and all other legislative obligations relating to employment
- ◆ operate within the law and comply with the standards of behaviour in this Code and the *Code of Tendering*
- ◆ establish internal mechanisms to deal with transgressions from this Code and the *Code of Tendering*, and
- ◆ adopt and promote a cooperative (nonadversarial) approach.

2.4 Unions

All unions are required to:

- ◆ communicate honestly with government agencies, employers and employer associations as well as other industry participants
- ◆ cooperate with the government, contractors, subcontractors, suppliers and employer associations and other industry participants in the industry reform process to achieve new and improved standards in: industrial relations, workplace relations, OHS&R, productivity and competitiveness of the construction industry
- ◆ comply with obligations in the *Occupational Health and Safety Act 1983* (and Regulations) as well as the relevant safety procedures in industry codes of practice, applicable awards and/or enterprise or project agreements to which the unions are party

- ◆ comply with the provisions of applicable awards and/or enterprise or project agreements, dispute settlement procedures, legislative requirements and with all orders, formal directions and decisions of any court or tribunal of competent jurisdiction
- ◆ encourage compliance by members and union officials with the requirements of this Code
- ◆ operate within the law and comply with the standards of behaviour in this Code
- ◆ establish internal mechanisms to deal with transgressions from the *Code of Practice*, and
- ◆ adopt and promote a cooperative (nonadversarial) approach.

3. Tendering Ethics

On government projects the adoption of the highest ethical principles is required by all parties at all levels of the project. Parties include government agencies, their agents, contractors, subcontractors, consultants and suppliers.

3.1 Ethical principles

The ethical principles which must be observed are:

- ◆ all aspects of the tendering process must be conducted with honesty and fairness at all levels of the industry
- ◆ parties must conform to all legal obligations
- ◆ parties must not seek or submit tenders without a firm intention to proceed
- ◆ parties must not engage in any practice which gives one party an improper advantage over another
- ◆ tenderers must not engage in any form of collusive practice and must be prepared to attest to their probity
- ◆ conditions of tendering must be the same for each tenderer on any particular project
- ◆ clients must clearly specify their requirements in the tender documents and indicate criteria for evaluation

- ◆ evaluation of tenders must be based on the conditions of tendering and evaluation criteria defined in the tender documents
- ◆ the confidentiality of all information provided in the course of tendering must be preserved*
- ◆ any party with a conflict of interest must declare that interest as soon as the conflict is known to that party.*

**Local councils and county councils are to observe the requirements under the Local Government Act 1993.*

3.2 Prohibited collusive practices

For the purpose of these principles, the prohibited collusive practices are defined to include the following:

- ◆ agreement between tenderers as to who should be the successful tenderer
- ◆ any meetings of tenderers to discuss tenders prior to the submission of the tenders if the client is not present
- ◆ exchange of information between tenderers about the tenders
- ◆ agreements between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderer
- ◆ agreements between tenderers to fix prices or conditions of contract. This means any collaboration between tenderers on prices or conditions to be included in contracts or commissions without the consent of the client
- ◆ any assistance to any tenderer to submit a cover tender (that is, a tender submitted as genuine but which has been deliberately priced in order not to win the contract or commission)
- ◆ any agreement between tenderers prior to submission of tenders to fix the rate of payment of employer or industry association fees where the payment of such fees is conditional upon the tenderer being awarded the contract or commission.

The *Code of Tendering* outlines in greater detail the obligations that must be met by all parties seeking tenders and those tendering for work on Government related projects or sites, including those with private sector funding.

4. Continuous Improvement And Best Practice

4.1 Commitment

A positive and lasting commitment to best practice is required of all parties and must be demonstrated by those seeking to do business with government, or working on projects. In the context of a construction industry enterprise this embraces superior:

- ◆ business relationship and practices
- ◆ organisational systems and standards
- ◆ people management policies and practices
- ◆ time, cost and quality outcomes.

Continuous improvement and best practice will be based on the following imperatives:

- ◆ client focus
- ◆ organisational reform:
 - leadership, communication and consultation
 - workplace matters (employer/employee relations, workplace practices, occupational health safety and rehabilitation (OHS&R), training and skill formation and teamwork)
 - management practice (quality management, OHS&R, subcontractor management, procurement, information management), and
- ◆ planning (environmental issues, buildability, project planning, business and financial planning).

4.2 Security of Payment

To ensure that all parties receive payments due to them, the highest ethical practices must occur throughout the contract chain ie. between the Principal and/or contractor, consultant; between the contractor and/or employees, subcontractor, consultant, supplier; between the subcontractor and/or employees, subcontractor, consultant, supplier and between the consultant and/or employees, sub-consultant. This specifically includes:

- ◆ ensuring the timely progress of the processing, management and finalisation of claims, payments, retentions and securities due under the contract, for all parties. For government projects, this means that contractors must have contracts in place down the contract chain with subcontractors, consultants and suppliers, that meet the government's policy for reflective clauses giving effect to this requirement
- ◆ contractors, subcontractors, consultants and suppliers meeting obligations in applicable awards and/or enterprise agreements and legislation, including those relating to superannuation and redundancy benefits and payments.

4.3 Cooperative Contracting

A cooperative contracting approach must be adopted including:

- ◆ cooperation with government agencies in the administration of contracts to enable those agencies to fulfil their contractual obligations
- ◆ ensuring that potential time and/or cost overruns are mitigated by timely co-operative effort by all parties
- ◆ responding promptly to reasonable requests for advice and information
- ◆ ensuring that a non-adversarial approach to dispute resolution is adopted and litigation is reserved as a last resort, and
- ◆ positive participation in cooperative project initiatives such as partnering.

4.4 Project Planning

In scope this refers to both pre-tender and post-tender activities. Government agencies and service providers are required to adopt a proactive approach to project planning in terms of:

- ◆ the application of strategic management principles
- ◆ clear definition of project scope
- ◆ clear risk identification and management strategies including industrial relations
- ◆ early identification of planning and resource issues - human, physical, occupational health safety and rehabilitation, environmental and financial

- ◆ well defined lines of communication
- ◆ clearly defined roles and responsibilities
- ◆ scheduling of tasks, and
- ◆ preparation of contingency plans.

In terms of construction programming, the impacts of inclement weather can be substantially reduced if contingency plans have been developed to:

- ◆ minimise down time so that productive work continues where possible
- ◆ enable transfer to other projects not affected by inclement weather, and
- ◆ utilise down time to the maximum extent possible for other productive activities. This may include: training, professional development, skills enhancement initiatives.

It is also important to ensure that occupational health and safety issues are systematically identified, assessed and managed during all phases of project delivery. In this way the efficient management of work will be optimised and project delays minimised.

4.5 Contract Management

Contract management must be undertaken with an appropriate level of competence and is to address:

- ◆ financial and technical skills
- ◆ knowledge of the applicable procurement and contract system
- ◆ commercial expertise, and
- ◆ identification and allocation of risk.

5. Workplace Reform

5.1 Scope

Contractors, subcontractors, consultants and suppliers are encouraged to continue to pursue and implement workplace reform strategies appropriate to the focus, size and capacity of the individual enterprise. The reform strategies should be based on a broad agenda aimed at achieving improved productivity by:

- ◆ effective communication (including consultation) and relationships between the employer, employees and applicable unions
- ◆ teamwork
- ◆ effecting high standards in occupational health safety and rehabilitation (OHS&R)
- ◆ improved training and skill formation opportunities to enhance individual skills and facilitate the optimal utilisation of workplace skills
- ◆ workplace practices which are more flexible and responsive to business demands and client requirements
- ◆ affirmative action, and
- ◆ continuous improvement and best practice.

These initiatives may be documented in an enterprise or project agreement

5.2 Training and Skill Formation

Contractors, subcontractors, consultants and suppliers are responsible for ensuring that they comply with the Government's relevant training, skill formation and equal employment opportunity policies, for the construction industry.

On selected projects, as identified by the Principal, contractors will be required to:

- ◆ establish a training facility, and
- ◆ develop in consultation with other employers on the project structured training and skill formation strategies which are appropriate to the needs of such project, each employer and its employees, and which should include persons re-entering the workforce, where appropriate.

6. Occupational Health Safety & Rehabilitation (OHS&R)

6.1 Obligations

Contractors, subcontractors, consultants, suppliers and their employees must comply with their OHS&R obligations under legislation, relevant industry codes of practice, safety procedures in applicable awards and/or enterprise or project agreements, and the general law.

Contractors are required to have an OHS&R management commitment which embraces all personnel on the project and is supported by:

- ◆ clearly defined policies
- ◆ procedures
- ◆ practices
- ◆ responsibilities
- ◆ performance standards
- ◆ induction training and task training, and
- ◆ communication and/or consultation.

The Government's *Occupational Health Safety and Rehabilitation Management Systems Guidelines* describes the management framework that is being implemented on construction projects.

6.2 OHS&R Training

Training is important on construction projects where the work environment changes frequently. It is therefore necessary to ensure that personnel working on a project:

- ◆ are made aware and understand the OHS&R requirements of the project, and
- ◆ have access to properly designed training programs.

A properly designed training program will:

- ◆ address training needs for each stage in the construction process
- ◆ ensure that all personnel on the project undergo induction training (new worker and/or project specific) and necessary task training to conform with OHS&R standards
- ◆ facilitate portability of acquired training, as may be appropriate, from project to project
- ◆ provide for the maintenance of appropriate project induction and OHS&R training records, and
- ◆ ensure that appropriate training is delivered by qualified persons.

6.3 Occupational Health and Safety Disputes

Where an unsafe condition exists on a construction project, work is to continue in all areas not affected by that condition and the employer must act promptly to rectify the unsafe condition.

However, there must be no limitations on the right of any employer to:

- ◆ move employees to a safe place to work, or
- ◆ to another construction site
- ◆ and do other appropriate and available work there.

Where safety rectification work has been completed in an area of a construction project and there is safe access, work will immediately resume in that area. Employers, employees and relevant unions must cooperate to ensure that safety rectification work commences immediately in the required area.

Where a dispute about occupational health and safety matters cannot be resolved by employers and employees at the workplace, determinations by Workcover inspectors made under the *Occupational Health and Safety Act 1983* and associated legislation must be accepted by all parties. No person is to be required to work in conditions involving a reasonable and genuine risk of death or injury.

Any time spent engaging in industrial action is subject to the provisions of section 7.8 of this Code.

7. Industrial Relations

7.1 Awards and Legal Obligations Relating to Employment

Contractors, subcontractors, consultants and suppliers must comply with the provisions of applicable:

- ◆ awards, and/or enterprise or project agreements, and
- ◆ legislative requirements.

Contractors must ensure that their subcontractors, consultants and suppliers comply with their legal obligations regarding their employees. Any relevant information is to be obtained through proper and lawful means, and in a way that respects confidentiality.

Arrangements or practices designed to avoid award and/or legislative obligations including inappropriately treating a genuine employee as an independent contractor and/or inappropriate application of the Prescribed Payments System (PPS) of taxation are not permitted.

7.2 Enterprise Agreements

Enterprise Agreements are important elements in achieving continuous improvement and best practice and should:

- ◆ reflect the needs of the enterprise, including the scope of the enterprise's operation and projects
- ◆ improve remuneration and work conditions
- ◆ give effect to measures to increase productivity

and may encompass

- ◆ improved OHS&R practices
- ◆ training and skill formation strategies
- ◆ broad skilling and broadbanding within appropriate training and safety frameworks
- ◆ cooperative, flexible workplace relationships and practices, for example, through flexibility in working hours.

Contractors must not, directly or indirectly, coerce other contractors, subcontractors, consultants or suppliers about the parties to and/or the content of their enterprise agreement.

7.3 Overaward Payments

‘Overaward payment’ is defined to mean any payment and/or benefit including superannuation above that set out in the relevant award and/or legislation.

Decisions on overaward payments, including superannuation, redundancy and workers compensation, shall be made by the individual employer to suit the needs of the enterprise. Employers may make payments into any appropriate redundancy fund for the benefit of employees.

A contractor must not, directly or indirectly, coerce other contractors, subcontractors, consultants or suppliers to make overaward payments.

The only exception to the above, is where there is a project agreement, as outlined in section 7.4, which provides for special payments, conditions and/or benefits to be applied on a site-wide basis. In such a situation the contractor, subcontractor or supplier may be required to comply with the terms of the project agreement.

7.4 Project Agreements

Project agreements incorporating special site-wide payments, conditions and/or benefits may be negotiated where the strategy has first been authorised by the Principal. Payments, conditions and/or benefits in a project agreement must be related to improved productivity measured in time and/or cost saving performance. ‘Time and/or cost saving performance’ means achieving a reduction of either the period of construction and/or a reduction in the construction cost to the benefit of the Principal.

As a general principle project agreements will only be appropriate for major contracts, as defined by the Principal from time to time. Typically, major contracts will have some or all of the following features: an extended construction period, high cost, identifiable contract packages within an overall program of works, rapidly changing technology, particular skill formation strategies, special industrial requirements, and presence of both private and public sector projects/investments.

The integrity of individual enterprise agreements must be maintained. This means project agreements cannot override contractors’, subcontractors’, consultants’ or suppliers’ individual enterprise agreements. However, there may be a provision in the relevant enterprise agreement that enables the parties to the enterprise agreement to encompass provisions in a project agreement.

The parties to a project agreement will not use any term in the project agreement for a precedent on any other project and/or for any other purpose. It is preferable that the project agreement is certified and/or registered under either the Australian and/or the NSW Industrial Relations Acts.

7.5 Site Allowances

Site allowances shall not be paid unless awarded by an industrial tribunal, after arbitration.

7.6 Membership of Registered Organisations

Willing membership of unions or employer associations is encouraged through proper and lawful means. This precludes victimisation, through any mechanism, for membership or non-membership of organisations.

7.7 Dispute Settlement

Contractors, subcontractors, consultants and suppliers are required to use every effort to resolve grievances or disputes with their employees and applicable unions at the enterprise level, in accordance with the procedure outlined in the applicable award, and/or enterprise or project agreement.

Where resolution is not possible at its source in the enterprise, the graduated steps of the dispute settlement procedure contained in applicable awards and/or enterprise or project agreements are to be complied with. This may include reference of the grievance and/or industrial dispute to the appropriate industrial tribunal. All parties are required to comply with tribunal decisions, subject to any legal appeal rights.

While the dispute settlement procedures are being followed:

- ◆ no industrial action is to take place
- ◆ the status quo that existed prior to the dispute must prevail, and
- ◆ work is to continue normally, without prejudice to any of the parties

Section 6.3 provides a mechanism for the management of occupational health and safety issues.

7.8 Strike Pay

No payment shall be made to employees for time spent engaged in industrial action (as defined by either the NSW or Australian Industrial Relations Acts, as appropriate), unless payment is authorised or ordered by either the NSW or Australian Industrial Relations Commissions.

7.9 Industrial Impacts

The Principal must be advised during the progress of the work, and at the earliest opportunity of any industrial relations and/or occupational health and safety matter which may have an impact on the construction program and/or the contract, project costs or other related contracts.

8. Compliance

8.1 NSW Government Policy

The New South Wales Government is committed to the implementation of this Code and the *Code of Tendering*.

Breaches of the Codes, as may be evidenced, through non compliance, lack of commitment or unethical activity, may result in sanctions being invoked.

Where the breach also involves any law or statute, the matter will be referred to the relevant enforcement agency.

Contractors, Subcontractors, Consultants and Suppliers

Sanctions for non compliance with the Codes are based on the Government's right as a client to choose with whom it does business.

The final sanction imposed will depend on the nature of non-compliance and may involve:

- ◆ a formal warning, or
- ◆ partial exclusion from tendering opportunities (ie: reduction in the number of tendering opportunities), or
- ◆ preclusion from tendering for any work for a specified period.

Sanctions can be applied by a single government agency for lesser breaches or on a Government-wide basis for more severe breaches.

Government Agencies

In the case of non-compliance by a government agency, the Minister responsible for that agency will consider appropriate action. Where it is demonstrated that individuals have acted in contravention of the agency's policies, practices and/or procedures, disciplinary action may be appropriate.

8.2 Enforcement

Government Agencies as Clients

For government projects monitoring the application of the *Code of Practice* and the *Code of Tendering* will be undertaken as part of the relevant agency's mainstream business function. However, to facilitate industry accessibility, each agency will:

- ◆ establish internal co-ordination procedures for managing Code(s) matters
- ◆ establish and advertise a central point of contact.

Construction Policy Steering Committee (CPSC)

The CPSC is responsible for the development of consistent construction, consultant and contractual policies to be implemented by government agencies. In this context the CPSC co-ordination role includes overall monitoring of the *Code of Practice* and the *Code of Tendering* to ensure they are being consistently applied across government projects. Accordingly, the CPSC Secretariat will also act as a central point of contact in respect of Code matters.

NSW Police Service

The Police Service will support the adoption of the principles of the *Code of Practice* and *Code of Tendering* by focusing on eliminating illegal and corrupt practices wherever this is found to exist in the industry.

8.3 Role of Industry

In addition to the NSW government seeking to ensure compliance with the standards of behaviour defined in this Code and the *Code of Tendering*, it is expected that the relevant industry organisations will contribute to the achievement of these standards.

Employer and Industry Associations

Where a contractor, subcontractor, consultant, supplier, employer or industry association representative is found to have breached the *Codes*, the circumstances of the breach will be referred to the relevant association for appropriate action under that association's rules and/or code of practice.

Unions

Where a union official or member is found to have breached or acted to incite a breach of the *Code of Practice*, the circumstances of the breach or action will be referred to the relevant union and the Labor Council of New South Wales for appropriate action under the union's rules and/or code of conduct.



CODE OF TENDERING FOR THE CONSTRUCTION INDUSTRY



CODE OF TENDERING - CONTENTS

1. INTRODUCTION	35
2. ETHICAL PRINCIPLES	36
3. APPLICATION OF THE CODE	37
3.1 DEFINITIONS	37
3.2 IMPLEMENTATION	37
3.3 CONSULTATION AND MONITORING	38
4. CLIENT'S OBLIGATIONS	38
4.1 TENDERING METHODS	38
INVITED TENDERS	38
NEGOTIATED TENDERS	39
4.2 FAIR DEALING	39
COMMITMENT TO PROCEED	39
NEGOTIATIONS	39
CONFIDENTIALITY	39
4.3 PROJECT DEFINITION	40
TENDER DOCUMENTS	40
SELECTION CRITERIA	41
4.4 PROCEDURES FOR INVITED TENDERS	41
ADVERTISEMENT OF TENDERS	41
ENQUIRIES BY TENDERERS	42
AMENDMENTS TO TENDER DOCUMENTS	42
RECEIPT OF TENDERS	43
EVALUATION OF TENDERS	43
NEGOTIATION	44
4.5 OUTCOME OF TENDERS	44
5. TENDERER'S OBLIGATIONS	44
5.1 RESPONDING TO INVITATIONS TO TENDER	44
5.2 REVIEW OF TENDER DOCUMENTS	45
5.3 FORMULATION OF TENDERS	45
STATUTORY AND LEGAL OBLIGATIONS	45
TENDER CONFORMANCE	45
COMPETITIVE BEHAVIOUR	46
5.4 SUBMISSION OF TENDERS	46
5.5 ENQUIRIES FROM THE CLIENT	47
5.6 MEETINGS	47
5.7 CONFIDENTIAL INFORMATION	47

1. Introduction

The purpose of this Code is to encourage the highest ethical standard in tendering practice by all participants in the construction industry in the belief that significant benefits will flow to the entire community.

It is intended that this Code should apply equally to clients, their agents, contractors, subcontractors, consultants and suppliers and that they and the employer and industry associations to which they belong should embrace it as a statement of the ethics which underpin best practice tendering procedures. The Code imposes an obligation on all those parties to refuse to condone unacceptable behaviour by others in the construction industry.

Inherent in adoption of the Code is willingness to deal only with organisations and personnel in the industry whose standards of performance and behaviour conform to those expressed in this Code.

This Code should be read in conjunction with the New South Wales Government *Code of Practice for the Construction Industry* and the *Implementation Guidelines*. The New South Wales Government *Capital Project Procurement Manual* is also an essential reference.

Any enquires concerning this *Code of Tendering* or the *Code of Practice* should be referred by industry participants to the appropriate government agency or the Construction Policy Steering Committee (CPSC). Public sector organisations should refer directly to the CPSC Secretariat:

**The Executive Director,
Construction Policy Steering Committee,
Level 23, McKell Building,
Rawson Place,
SYDNEY NSW 2000
Ph 02 9372 8885, Fax 02 9372 8822.**

2. Ethical Principles

This Code is based on the following ten ethical principles:

- 1 all aspects of the tendering process must be conducted with honesty and fairness at all levels of the industry
- 2 parties must conform to all legal obligations
- 3 parties must not seek or submit tenders without a firm intention to proceed
- 4 parties must not engage in any practice which gives one party an improper advantage over another
- 5 tenderers must not engage in any form of collusive practice and must be prepared to attest to their probity
- 6 conditions of tendering must be the same for each tenderer on any particular project
- 7 clients must clearly specify their requirements in the tender documents and indicate criteria for evaluation
- 8 evaluation of tenders must be based on the conditions of tendering and selection criteria defined in the tender documents
- 9 the confidentiality of all information provided in the course of tendering must be preserved*
- 10 any party with a conflict of interest must declare that interest as soon as the conflict is known to that party.*

These principles apply to all parties in the contractual chain thus the terms “client” and “tenderer” are interchangeable at each link in the chain. For example, a contractor will act as a client when seeking tenders for subcontract packages.

**Local councils and county councils are to observe the requirements under the Local Government Act 1993.*

3. Application of the Code

The *Code of Tendering* and the *Code of Practice* apply to all Government building, construction, maintenance and materials supply contracts, consultant commissions and government funded projects and sites within the construction industry. These Codes place obligations that must be met by all parties seeking tenders and those tendering for work on Government related projects or sites, including those with private sector funding.

3.1 Definitions

In this context of this Code the following definitions apply:

‘Construction industry’ includes all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

‘Clients’ parties receiving tenders, including councils and county councils.

‘Fairness’ means being objective, reasonable and even-handed. Being fair does not mean satisfying everyone. It can be unfortunate, but not unfair, that people may be adversely affected by decisions.

‘Tenders’ prices, bids, quotations and consultant proposals.

‘Tenderers’ parties submitting tenders.

‘Value for money’ is determined by considering all the factors which are relevant to a particular purpose, for example: experience, quality, reliability, timeliness, service, initial and ongoing costs, are all factors which can make a significant contribution impact on benefits and costs. Value for money does not automatically mean the ‘lowest price’. It is important to be clear about how value for money will be determined in any particular set of circumstances prior to assessing bids.

3.2 Implementation

This Code will take effect on all new contracts and projects in respect of which tenders are invited from 1 July 1996.

The *Code of Tendering for the Construction Industry* contained in Practice Note No 8, will continue to apply on all existing projects and/or projects for which tenders were called prior to 1 July 1996.

3.3 Consultation and Monitoring

Consultation will take place from time to time with contractors, subcontractors, consultants, suppliers, and employer and industry associations.

This Code will be reviewed from time to time to ensure that the provisions of the Code remain appropriate to the prevailing industry environment. The abovementioned industry participants will be consulted in the course of such reviews.

4. Client's Obligations

4.1 Tendering methods

It is the client's decision as to the most appropriate tendering method that will be used. Clients should use their best endeavours to select a tendering system best suited to the project to be undertaken including the basis upon which the project is being procured and/or financed. The methods are:

Invited tenders

Open tenders

Clients invite tenders by public advertisement without restriction on the number of tenders received. Clients would normally require tenderers to demonstrate they have the necessary skills, resources, employee management, environmental management, quality and safety management and financial capacity to carry out the work.

Selective tenders

Clients invite expressions of interest for specific projects. Applicants are evaluated against published selection criteria and a number of those who best meet the required criteria are invited to tender,

or

Clients select a small number of tenderers from a register of approved tenderers. Clients will establish and maintain the register by regular public advertisement for inclusion of other tenderers and by regular review of those on the register against advertised criteria. Clients may also use certain other registers established by public advertisement.

Negotiation

Where none of the previous methods result in acceptance of a tender clients may negotiate with tenderer(s) to achieve a desired outcome. Clients will need to document the reasons why tendering was unsuccessful. Negotiations must deal fairly with all tenderers in a manner which reflects the ethical principles of this Code.

4.2 Fair Dealing

Commitment to Proceed

Clients should not call tenders without a firm commitment and capacity to proceed.

Clients should not discriminate against an invited tenderer who occasionally but promptly declines an invitation to tender.

Negotiations

In any tender related negotiations or evaluation, the clients must deal fairly with all tenderers in a manner which reflects the ethical principles of this Code. Clients must not in any way seek to trade off different tenderers prices against others in an attempt to seek lower prices. This practice is sometimes known as 'bid shopping' and is unacceptable.

Confidentiality

Confidentiality of information, particularly intellectual property, must be observed throughout the tender process. This means that information provided by a tenderer relating to a tender should not be divulged to another tenderer at any stage during the tender process. The conditions applying to and the scope of information that may be released are described in Section 4.5 Outcome of Tenders and in the Local Government Act 1993 and Local Government (Tendering) Regulation 1993.

4.3 Project Definition

The client should ensure that reasonable investigations and planning have taken place so the project can be clearly defined for preparation of tender documents.

Tender documents

Documentation should be reasonably complete so as to reflect the procurement strategy. Clients should have regard to the costs to the construction industry and the community at large of tender preparation.

The tender documents:

- ◆ must clearly define the contractual obligations of the parties
- ◆ must provide full details of all work covered by the tender
- ◆ must draw attention to any special conditions or obligations under the contract which depart from the client's normal practice
- ◆ must designate any supporting information required from tenderers
- ◆ must nominate a person for the provision of additional information
- ◆ should provide positive encouragement to tenderers, allowing them the option, in addition to submitting a conforming tender, to show how an alternative might offer better value for money
- ◆ must identify the criteria on which the assessment of tenders will be based, and
- ◆ should include notification as follows

“All tenderers must comply with the New South Wales Government Code of Practice for the Construction Industry. Lodgement of a tender will be evidence of the tenderer's agreement to comply with the Code for the duration of any contract that may be awarded.

“If any tenderer fails to comply with the Code, their failure may be taken into account by the Principal when considering this or any subsequent tender and may result in this or any subsequent tender being passed over.”

Selection criteria

Selection criteria should contain the critical factors that will make the project successful. These include, but may not be limited to:

- ◆ conformity
- ◆ innovation
- ◆ value for money
- ◆ construction period
- ◆ quality assurance
- ◆ price compared with estimated cost
- ◆ technical, management, physical, environmental management and financial resources
- ◆ current commitments
- ◆ previous contractors performance and
- ◆ industrial relations and occupational health and safety record.

Selection criteria must be clearly advised to tenderers in the tender documents. If criteria have not been included in the tender documents, the criteria must be determined prior to evaluation of tenders to ensure an objective and rational basis for the assessment. Weighting of selection criteria should be decided prior to the closing of tenders but should not be disclosed to tenderers.

4.4 Procedures for invited tenders

Advertisement of tenders

Where tenders are called by public advertisement, clients should provide equal opportunity to all qualified tenderers and all tenderers are expected to respond with integrity to all requirements of the invitations to tender.

CODE OF TENDERING - CLIENT'S OBLIGATIONS

Tenders should be advertised so as to attract suitable and competitive bidding and the advertisements should include as a minimum:

- ◆ adequate description of the work required
- ◆ advice from where tender documents may be obtained and particulars of the contact officer
- ◆ precise details of where and when tenders will close
- ◆ price of purchasing the tender documents, if applicable
- ◆ prominent notification of the need for tenderers to comply with the NSW Government *Code of Practice* and *Code of Tendering for the Construction Industry*.

In framing the advertisement, clients should allow a reasonable time for tenderers to make site visits and undertake any other work necessary to allow them to respond fully. Clients should make the site reasonably available for inspection by tenderers.

Enquiries by tenderers

Any information given to a particular tenderer will also be given promptly to all other tenderers.

Clients should nominate a person with knowledge of the work, to respond to all enquiries from tenderers. All such inquiries should be recorded, noting time and date of receipt and the issue discussed.

Where an enquiry reveals a significant error, including ambiguities or discrepancies, information provided should be promptly conveyed in writing to all tenderers. Where the tender documents require a pre-tender conference, such conference should be minuted and the minutes should be forwarded to all tenderers, and become a part of the tender documents.

Amendments to tender documents

Where it becomes necessary to amend tender documents, the amendments must be advised as an addendum to all tenderers in sufficient time for all tenderers to properly and fully consider the addendum before tenders close.

Consideration should be given to extending the tender period when an addendum is issued.

Each addendum should state clearly that it is meant to be incorporated in the tender documents. Tenderers should be required to confirm its receipt in writing, and should confirm in their tenders that allowance has been made for each addendum.

Receipt of tenders

Probity is vital at all stages of the tendering process, including the receipt and processing of tenders.

All necessary arrangements must be made to safeguard the security and confidentiality of all tenders.

Tender documents must specify the method and time for lodgement of tenders. Public acknowledgment of those tenderers submitting a tender should be made.

Late tenders must not be accepted, except as provided by the Local Government (Tendering) Regulation 1993.

Where a late tender is received, the time and date of receipt shall be noted on the document and endorsed by the recipient.

Evaluation of tenders

Tenders should be assessed by people with relevant skills and knowledge and who are free of any conflict of interest that might undermine the objectivity of the assessment. Tenders should be assessed in a consistent fashion against the pre-determined criteria contained in the tender documents.

Any tender which does not comply with the tender documents may be rejected. Where clients reject a tender, the reasons for such action should be clearly documented by the client.

Tenderers may be encouraged to offer alternative, better value for money proposals. Clients should specify the conditions under which alternative proposals are to be submitted. Otherwise alternative proposals should only be considered when submitted with a conforming tender. Where a tenderer offers an alternative, a comparable price for the alternative should not be obtained from other tenderers nor should the detailed alternative be used as the basis for the recall of tenders.

Should it be decided not to accept any tender and to recall tenders, the original tenderers should be advised of the reasons for recalling. This should not prevent clients from adding other tenderers to the tender list.

Negotiation

Should none of the tenders be acceptable (or conforming), negotiations may be conducted, preferably in the first instance with the least unacceptable with the aim of achieving a conforming tender.

Clients must not in post tender negotiation unfairly seek to trade off different tenderers' prices against others in an attempt to seek lower prices. This practice is sometimes known as 'bid shopping' and is unacceptable.

Written records of all negotiations should be maintained by the client.

4.5 Outcome of tenders

Clients may advise the name of the successful tenderer and the awarded contract sum.

No confidential information is to be released in relation to unsuccessful tenders.

Unsuccessful tenderers for major projects should be advised (in writing) that their tenders have been unsuccessful.

For major projects, the option of providing a debriefing for unsuccessful tenderers, as to how their tender performed against the selection criteria, may be pursued with the objective of enhancing future performance.

5. Tenderer's Obligations

5.1 Responding to invitations to tender

Tenderers should not respond to a call for tenders unless they genuinely believe themselves to have the capability and capacity to undertake the work being offered.

In the case of selective tenders, tenderers have the right to decline to tender, but should give the client prompt advice that they do not wish to tender.

5.2 Review of tender documents

Tenderers should thoroughly familiarise themselves with the documents, and the site upon which the project is to be constructed, to ensure that their tenders are complete and reflect a full understanding of the work required.

Tenderers must accept that should any one of them ask the client to supply additional information that such information will also be supplied by the client to all tenderers.

Tenderers should advise the client promptly of errors, omissions, ambiguities or discrepancies in the tender documents of which the tenderer becomes aware.

5.3 Formulation of tenders

Statutory and legal obligations

Tenderers must observe all relevant statutory and other legal requirements in the formulation of their tenders. They must not:

- ◆ enter into any improper commercial arrangements with any other contractors, subcontractors, consultants or suppliers
- ◆ seek to influence contract decisions during the tender process
- ◆ accept incentives to provide contracts or services to other contractors, subcontractors, consultants or suppliers, or
- ◆ accept or provide secret commissions.

Tender Conformance

Tenderers must endeavour to provide a tender that conforms to all aspects of the criteria specified in the tender documents.

Competitive behaviour

Tenderers must not engage in any uncompetitive behaviour or other practice which denies legitimate business opportunities to other tenderers or other participants in the tender process, including but not limited to the following matters concerning collusive tendering:

- ◆ agreement between tenderers as to who should be the successful tenderer
- ◆ any meetings of tenderers to discuss tenders prior to the submission of the tenders if the client is not present
- ◆ exchange of information between tenderers about the tenders
- ◆ agreements between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderer
- ◆ agreements between tenderers to fix prices or conditions of contract. This means any collaboration between tenderers on prices or conditions to be included in contracts or commissions without the consent of the client
- ◆ any assistance to any tenderer to submit a cover tender (that is, a tender submitted as genuine but which has been deliberately priced in order not to win the contract or commission)
- ◆ any agreement between tenderers prior to submission of tenders to fix the rate of payment of employer or industry association fees where the payment of such fees is conditional upon the tenderer being awarded the contract or commission.

5.4 Submission of tenders

Tenderers must lodge their tender with full identification and documentation at the nominated location by the advertised date and time.

5.5 Enquiries from the client

When requested by the client tenderers will submit required documentation or provide information in a complete form and lodge by the date and time nominated so as to not cause unnecessary delays in the tender process.

5.6 Meetings

Tenderers will make themselves available to attend meetings with the client after receipt of reasonable notice.

5.7 Confidential information

All information provided to a tenderer by the client must be treated as confidential. The tenderer shall undertake to maintain that information as confidential.

New South Wales
Government

Code of Practice &
Code of Tendering
for the
Construction Industry

Implementation Guidelines

3rd edition

Important Note:

This is an unprotected copy of the Implementation Guidelines.
It is provided for reference purposes only until supplies of
the published document become available.

Foreword

The New South Wales Government has a commitment to enhancing the performance, competitiveness and stability of the State's construction industry.

The Government's reform program is aimed at ensuring the industry is able to respond to the growing demands on productivity and skills associated with the increased construction activity in this State.

It is based on a 'whole of government' approach to consistent application of policy and management practices, and it promotes a cooperative approach to the way the industry does business, including compliance with all laws and regulations.

The Government's Code of Practice for the Construction Industry and Code of Tendering are pivotal elements of the reform program. They establish principles and standards of behaviour which must be observed by any contractor, subcontractor, consultant and supplier wishing to do business with the government, or working on projects to which the Codes apply, including projects with private sector funding.

The Codes outline what is expected of public sector clients, local government authorities, employer and industry associations and unions operating in the construction industry. They will be widely adopted and should be seen as a benchmark for all industry participants.

These Implementation Guidelines should be read with the Codes. They expand on the Codes' key aspects and the intent of their policies and practices.

The Government's Capital Project Procurement Manual is also an essential reference. It provides integrated packages of initiatives directed at industry reform and ensures a coordinated approach to implementing innovation and improvement.

Hon. Carl Scully, MP
Minister for Public Works and Services,
Minister for Ports, Assistant Minister for Energy and
Assistant Minister for State and Regional Development.

Contents

1 INTRODUCTION	1
OBJECTIVES 1.1	1
DEFINITIONS 1.2	1
IMPLEMENTATION 1.3	3
CONSULTATION 1.4	3
2 ROLES	4
GOVERNMENT AGENCY RESPONSIBILITIES 2.1	4
GOVERNMENT AGENCIES AS CLIENTS	4
WORKCOVER AUTHORITY	4
DEPARTMENT OF INDUSTRIAL RELATIONS	5
CONTRACTORS, SUBCONTRACTORS, CONSULTANTS AND SUPPLIERS 2.2	5
EMPLOYER AND INDUSTRY ASSOCIATIONS 2.3	5
UNIONS 2.4	5
3 TENDERING ETHICS	6
ETHICAL PRINCIPLES 3.1	6
PROHIBITED COLLUSIVE PRACTICES 3.2	6
CONFLICT OF INTEREST 3.3	6
4 CONTINUOUS IMPROVEMENT AND BEST PRACTICE	8
COMMITMENT 4.1	8
BEST PRACTICE	8
SECURITY OF PAYMENTS 4.2	8
SUBCONTRACTORS, CONSULTANTS AND SUPPLIERS	9
COOPERATIVE CONTRACTING 4.3	9
COOPERATIVE EFFORT	9
NON-ADVERSARIAL APPROACH	10
PROJECT PLANNING 4.4	10
MINIMISING THE DISRUPTION CAUSED BY INCLEMENT WEATHER	11
CONTRACT MANAGEMENT 4.5	11
5 WORKPLACE REFORM	12
SCOPE 5.1	12
TRAINING AND SKILL FORMATION 5.2	12
6 OCCUPATIONAL HEALTH SAFETY & REHABILITATION (OHS&R)	14
OH&S INDUCTION	15
INDUSTRY CODE OF PRACTICE	15

7 INDUSTRIAL RELATIONS **16**

AWARDS AND LEGAL OBLIGATIONS RELATING TO EMPLOYMENT 7.1	16
LIABILITY OF PRINCIPAL CONTRACTOR TO PAY EMPLOYEES OF OTHERS	16
EMPLOYEE TAKEOVER	17
AVOIDANCE OF AWARD OR LEGISLATIVE OBLIGATIONS	17
HOW DOES ONE KNOW WHETHER A WORKER IS AN EMPLOYEE OR A SUBCONTRACTOR?	17
WORKERS - EMPLOYEES OR SUBCONTRACTORS?	18
INDICATIONS THAT A WORKER IS AN EMPLOYEE	18
INDICATIONS THAT A WORKER IS A SUBCONTRACTOR	19
TAXATION REQUIREMENTS	19
ALL-IN PAYMENTS	20
OVERTIME	20
REDUNDANCY	20
ENTERPRISE AGREEMENTS 7.2	20
OVERAWARD PAYMENTS 7.3	21
PROJECT AGREEMENTS 7.4	21
SITE ALLOWANCES 7.5	22
MEMBERSHIP OF REGISTERED ORGANISATIONS 7.6	22
DISPUTE SETTLEMENT 7.7	22
STRIKE PAY 7.8	23
INDUSTRIAL IMPACTS - REPORTING TO THE PRINCIPAL 7.9	23

8 COMPLIANCE **24**

NSW GOVERNMENT POLICY 8.1	24
ENFORCEMENT 8.2	24
OCCURRENCES OF A BREACH	24
APPLICATION OF SANCTIONS	24
CONSTRUCTION POLICY STEERING COMMITTEE (CPSC)	25
ROLE OF INDUSTRY 8.3	28

9 CONSTRUCTION POLICY STEERING COMMITTEE MEMBER AGENCIES **29**

10 NEW SOUTH WALES POLICE SERVICE LIAISON OFFICERS **31**

1 INTRODUCTION

Objectives 1.1

The Code of Practice and attendant Code of Tendering seek to:

- define minimum levels of acceptable behaviour, and
- provide goals that facilitate the achievement of higher performance by both individuals and organisations.

These are reflected in the objectives defined in the Code which are supported by sanctions that may be applied, when the need arises, via the government's right to choose with whom it wishes to do business. On a whole of government basis the government's consolidated purchasing power represents some 30% of the national non-residential market.

The Construction Policy Steering Committee (CPSC) is responsible for coordinating and facilitating:

- a thorough overhaul of government standards and policies, and
- the development of consistent construction, consultant and contractual policies to be implemented by government agencies.

Representation on the Committee is drawn from the NSW central agencies, all construction agencies in the non-budget sector and NSW Department of Public Works and Services, which acts on behalf of the budget sector agencies. Participation consists of a coordinating peak body and a number of working groups.

In excess of 85% of the NSW Capital Investment Program is marshalled directly within the peak body, with the remainder being accounted for by agency participation in the various Construction Policy Steering Committee working parties.

The widespread adoption of the Codes will be promoted as a suitable benchmark for all participants in the construction industry.

Definitions 1.2

'Award' legally enforceable determination made by the Australian and/or NSW Industrial Relations Commission containing the minimum terms and conditions of employment to be met by the relevant employer.

'Affirmative action' policy that is intended to redress discriminatory practices, especially in regard to employment. The policy is commonly used as a means of redressing gender-bias, sexual preference, disability, or racial discrimination.

'Clients' parties receiving tenders.

'Consultant' professional or organisation providing design, management, cost or other services to a Principal, contractor, subcontractor, consultant, client or supplier.

'Construction industry' includes all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

'Contractor' individual or organisation responsible for the performance of the work specified under a contract.

'Employer association' association whose membership generally consists of employers who operate in the construction or related industries and which is registered under the Australian and/or NSW Industrial Relations Acts.

'Enterprise agreement' agreement applying to an enterprise or bargaining unit which has been given legal force under the Australian and/or NSW Industrial Relations Acts.

'Fairness' means being objective, reasonable and even-handed.

Being fair does not mean satisfying everyone. It can be unfortunate, but not unfair, that people may be adversely affected by decisions.

'Industry association' organisation representing the professional and/or trade or commercial interests of members in the construction or related industries.

'Industry code of practice' a code which has been approved by the Minister for Industrial Relations, and is a practical guide to achieving the standard of health and safety required by the Occupational Health and Safety Act, 1983 (and Regulations) for a particular area of work.

'Overaward payment' payment and/or benefit including superannuation above that set out in the relevant award and/or legislation.

'Principal' the person or entity who is the party contracting with a contractor or consultant for the carrying out of work.

'Service providers' contractors, subcontractors, consultants and suppliers.

'Site allowance' award made by the NSW Industrial Relations Commission to provide compensation to affected employees engaged at a particular work site, if they encounter conditions so far removed from the type of conditions normally experienced on construction sites as to warrant extra compensation. Ref: Transbridge Pty Ltd, Nepean River Bridge, Menangle Award Appeal 31 May 1979; Copper Bella Site, Full Bench Decision, 17 October 1989.

'Subcontractor' party which provides a service and/ or product to a contractor and/or subcontractor or client.

'Supplier' party which provides a product and/or service to a client.

'Tenders' prices, bids, quotations and consultant proposals.

'Tenderers' parties submitting tenders.

'Union' organisation of employees working in the construction or related industries and which is registered under the Australian and/or NSW Industrial Relations Acts, and includes the Labor Council of New South Wales as the State peak council of employees.

'Value for money' is determined by considering all the factors

which are relevant to a particular purpose, for example: experience, quality, reliability, timeliness, service, initial and ongoing costs, can all make a significant impact on benefits and costs. Value for money does not automatically mean the 'lowest price'. It is important to be clear about how value for money will be determined in any particular set of circumstances prior to assessing bids.

Implementation 1.3

The Codes apply to all government building, construction and maintenance and material supply contracts, consultant commissions and government funded projects and sites within the construction industry. This includes projects involving private sector participation in the provision of the State's assets, for example by way of Build/Own/Operate (BOO) schemes and similar arrangements. These Codes place obligations that must be met by all those tendering for work on government related projects or sites, including those with private sector funding.

For those projects or sites managed by local government, but funded wholly or in part by the New South Wales Government, the Codes as presented in the relevant Department of Local Government and Co-operatives Practice Note are to be applied.

The practice note expresses the NSW Government's Codes in a manner consistent with the Local Government Act 1993.

The NSW Government Code of Practice for the Construction Industry, October 1992 will continue to apply on existing projects and on projects for which tenders were called prior to 1 July 1996.

The Code of Practice and attendant Code of Tendering, July 1996, will apply to all contracts and projects for which tenders are invited on or after 1 July 1996. These Codes will not apply retrospectively.

In this regard the CPSC has prepared a notification for inclusion in all tender documents.

The notification should, in general terms, be similar to the following passage:

"All tenderers must comply with the New South Wales Government Code of Practice for the Construction Industry. Lodgement of a tender will be evidence of the tenderer's agreement to comply with the Code for the duration of any contract that may be awarded.

"If any tenderer fails to comply with the Code, their failure may be taken into account by the Principal when considering this or any subsequent tender and may result in this or any subsequent tender being passed over."

In addition to tender documentation, advertisements for tenders should prominently display the following:

"Tenderers are required to comply with the New South Wales Government's Codes of Practice and Tendering for the Construction Industry."

When seeking further advice or clarification, agencies should first direct their enquiries to their CPSC representative or, where they do not have direct representation, to the CPSC Executive Director. This will ensure a consistent approach is maintained.

Consultation 1.4

A formal consultative process will be established with key industry participants to discuss issues arising from the implementation of the Code.

The Code will be reviewed from time to time in order to ensure that the primary objectives set out in the Code are appropriate to the prevailing environment. Industry participants will be consulted in the course of such reviews.

2 ROLES

These Implementation Guidelines expand on the policies and practices outlined in the Code of Practice and Code of Tendering and should be referenced by all parties in fulfilling their obligations. Good working relationships between:

- clients, contractors, subcontractors, consultants, and suppliers,
- government, unions, employer and industry associations, and
- employers, employees and unions

can only be built on trust and cooperation rather than mistrust and confrontation.

In this regard, an industry culture is required which:

- features the highest regard for the rights and preferences of the client
- is characterised by relationships built on trust, honesty, and cooperation at all levels
- is committed to improving: skills, efficiency, productivity, and competitiveness in the construction industry
- is committed to improving industrial relations and achieving high standards in occupational health safety and rehabilitation
- and environmental management
- is committed to continuous improvement and best practice, and
- demonstrates compliance with the spirit and intent of all relevant laws and regulations.

Government agency responsibilities 2.1

Government agencies as clients

Government agencies, their employees and/or agents are required to observe the standards of behaviour outlined in section 2.1 of the Code of Practice. The implementation of the Code of Practice and the Code of Tendering and the construction industry reform program is a part of an individual agency's normal agency responsibilities to government.

WorkCover Authority

The WorkCover Authority is responsible for enforcing the laws relating to occupational health and safety, workers compensation and rehabilitation. The Authority also assists industry to fulfil its statutory responsibility to ensure occupational health and safety in the workplace.

In relation to the government's commitment to improving OHS&R performance in the NSW construction industry, WorkCover's role is to assist government agencies in the implementation of the government's OHS&R management systems guidelines.

WorkCover will assist government agencies who have primary responsibility for administering and ensuring consistency of compliance with occupational health safety and rehabilitation management systems policy.

Department of Industrial Relations

The Department of Industrial Relations plays a pivotal role in the establishment and maintenance of the framework of industrial relations in NSW.

The Department of Industrial Relations monitors the conduct of industrial relations throughout the State and provides a number of services related to the day to day operation of the industrial system. It operates an award Enquiries Service, a Prosecutions Branch and an Industrial Inspectorate. These services allow industrial parties and employees to be fully apprised of their rights and obligations and provide a vehicle for the prosecution of breaches of industrial awards and legislation.

Contractors, subcontractors, consultants and suppliers 2.2

All service providers are required to comply with section 2.2 of the Code of Practice as well as all the other requirements outlined in the Code of Practice and attendant Code of Tendering.

Employer and industry associations 2.3

The Code of Practice seeks a commitment from employer and industry associations to promote and comply with the provisions of the Code and the full spirit and intent of all laws that impact on the construction industry and to fulfil the requirements outlined in section 2.3 of the Code.

Unions 2.4

Unions are required to fulfil the requirements of section 2.4 of the Code of Practice and similarly promote and comply with the provisions of the Code of Practice and the full spirit and intent of all laws that impact on the construction industry.

3 TENDERING ETHICS

Ethical principles 3.1

On government projects the highest ethical standard in tendering practice is required by all participants at all levels of the contract chain on a project. That is: clients, their agents, contractors, subcontractors, consultants and suppliers. These are fully detailed in the Code of Tendering.

By embracing the ethical principles, significant benefits will flow to the community through the elimination of malpractice.

The Code of Tendering has been framed with the expectation that it would be embraced as a statement of ethics that underpin best practice tendering procedures, not only by those to whom it is directed but also by the employer and industry associations of which they are members.

Prohibited collusive practices 3.2

It must be emphasised that collusive tendering practices are prohibited.

These practices are inconsistent with the establishment and maintenance of the ethical business practices which must underlie good working relationships between the government and any contractors, subcontractors, consultants and suppliers seeking to

do business with it, or working on projects to which the Code applies, including those with private sector funding.

These practices have both direct and indirect adverse impacts on the cost of government projects. They include:

- **direct costs**
 - through the inclusion of allowances for unsuccessful tenders in tender prices and special fees payable to employer and industry associations
- **indirect costs**
 - through reduced effectiveness of the competitive tendering process.

Government agencies need to ensure to the maximum extent possible that the practice of unsuccessful tenderers' fees and other collusive practices do not recur.

Conflict of interest 3.3

The NSW Government established the Independent Commission Against Corruption (ICAC) as a priority initiative to deter corruption in public administration.

ICAC investigations have produced a number of examples which attests to the need for all public agencies to ensure that their performance in this area is beyond reproach.

Conflict of interest, at either a personal or agency level, can arise where there is a reasonable expectation of direct or indirect benefit or loss for an individual employee with a particular personal interest that could be influenced, or appear to be influenced, in favour of that interest, in the performance of their duties. The benefit or loss may be financial or non-financial.

There is a reasonable community expectation that where such conflict occurs, it will be declared, assessed and resolved in favour of the public interest.

Individual employees also have an obligation to report possible or actual conflict or incompatibility between their public duties and their personal or private lives. In the event of conflict, or potential conflict, individual employees must make prompt disclosure and agencies need to respond appropriately.

The objective of disclosing interests which are or could be in conflict with official duties is to ensure prompt consideration, comprehensive assessment and, where necessary, the implementation of alternative working arrangements or other action, by the agency concerned.

4 CONTINUOUS IMPROVEMENT AND BEST PRACTICE

Commitment 4.1

The Code of Practice outlines the commitment to best practice required as well as the initiatives and practices which all participants are expected to address in a positive manner. These initiatives and their adoption:

- are being included in the NSW Government's Capital Project Procurement Manual
- can be a feature of organisational reform objectives and targets, and
- are further developed through a number of ongoing CPSC construction industry strategies.

As the latter strategies are developed and industry is consulted on the initiatives, the Capital Project Procurement Manual will be updated.

Commitment to continuous improvement and best practice and adoption as routine practice by all parties is fundamental to the realisation of long-term reform, productivity and efficiency improvements throughout the construction industry.

Government agencies are expected, in their dealings with industry, to encourage the attainment of best practice by all participants.

Best practice

In the context of a construction industry enterprise, as defined in the Code of Practice, this embraces superior:

- business relationships and practices
- organisational systems and standards
- people management policies and practices
- time, cost and quality outcomes.

Enterprises with this focus will have a workplace culture and output that is characterised by value, quality, innovation and competitiveness.

Security of payments 4.2

In the context of section 4.2 of the Code of Practice, this means a:

- responsibility on claimants for accurate and timely preparation, documentation and submission of claims
- responsibility on all payers to consider, process, pay and finalise claims in a reasonable and timely manner
- requirement on each party to a claim to address, negotiate and settle any dispute in a reasonable, timely and cooperative way, and
- a requirement by contractors, subcontractors, consultants and suppliers to fulfil applicable award and/or enterprise agreement or legislative requirements regarding their employees.

Subcontractors, consultants and suppliers

To provide greater security with respect to monies due to subcontractors, the following applies on government projects:

- subcontractors are to have the option of providing approved unconditional undertakings (Bank Guarantees) in lieu of cash security and cash retentions
- cash security and retention monies are to be placed in Trust Accounts by the holders of those monies
- prior to work commencing, contracts must be in place down the contract chain which include reasonable terms of payment consistent with that which exists between the Principal and contractor
- reflective payment clauses for contracts valued at more than \$25,000 must be in place prior to the work commencing to ensure the following:
 - ◆ equitable terms of payment are observed for all parties down the payment chain
 - ◆ Alternative Dispute Resolution is available down the contract chain, and
 - ◆ interest on late payments in subcontracts are to be the same as in the head contract.

The effect this approach will have is that the potential extent of subcontractor exposure to non-payment for work done on government projects will be dramatically reduced by:

- ensuring the payment period between contractor and subcontractor is linked to that between the Principal and contractor; the generally shorter period than is current practice will reduce the quantum of money owing
- prohibiting the practice of 'pay-if-paid', and
- by placing security and retention monies in trust subcontractors have better than a secured creditor status in respect of these monies.

Cooperative contracting 4.3

The construction industry has long been criticised as paying insufficient attention to clients needs. Tendencies have been recognised for sectional or individual self-interest to predominate over the reasonable obligations to a client or other service receiver, regardless of their place in the system. Improved project outcomes, especially in the administration of contracts, is dependent on a commitment to an industry culture that is client focused.

This is particularly significant when bearing in mind that client service provider relationships occur at every tier of the industry and also within tiers.

In the government's view it is crucial for the industry that a culture develops where all industry participants at all levels are committed to quality client service and quality outcomes.

Cooperative effort

Within the construction industry, adversarial project relationships have too frequently been a characteristic pattern.

This has resulted in individuals or sectional interests placing their own benefit above any other consideration. This has meant that even when a minor problem arises liability is shirked rather

than solutions sought. These difficulties and counter co-operative attitudes have occurred at many levels of the industry including both professional disciplines and trade groups.

To reduce time, cost or process over-runs, every effort should be made to share project expectations, co-operate on problem definition and resolution, and take all steps to prevent conflicts from escalating into claims or disputes. This requires a commitment by all parties to address dealings positively, seek to avoid disputes and to actively support project initiatives such as Partnering.

Non-adversarial approach

Even with good management, a conducive environment and the best intentions, contract disputes will still occur. Where these disputes cannot be resolved within the scope of project management, a formal process needs to be available.

In order to strategically improve on previous practices and expedite settlements agreeable to all parties, it is now mandatory that provisions for Alternative Dispute Resolution (ADR) are included in all government construction contracts and public sector agencies are required to encourage ADR techniques and application.

ADR is intended to ensure that litigation becomes a remedy of last resort, for the settlement of project and contract disputes. To be an effective management tool, ADR requires a genuine commitment to:

- resolution of disputes
- recognition of the other side's perspectives
- objective appraisal of issues, conflicts and fair practice, and
- adoption of an open approach to conflict and the rights, entitlements and interests of competing participants.

Project planning 4.4

The emphasis of section 4.4 of the Code of Practice is on a proactive approach by government agencies and service providers to project planning. In the past, three key issues tended to dominate the process of bringing projects to fruition:

- time
- cost, and
- quality.

Today, the fulfilment of a successful project also depends on:

- how well or how badly the project initiation was handled and innovative solutions found to satisfy the client's needs
- the quality of the involvement of the parties
- the strength of communications and how well and how badly people interact
- the observance of probity, fairness and flexibility in all phases from development of the concept, through the planning and construction processes, and
- whether or not the parties have performed well and within the law.

Minimising the disruption caused by inclement weather

Project planning and design management should proactively address, and where possible establish, contingency action for the occurrence of inclement weather, rather than allowing it to passively stall a project.

Attention to this routine event, for the great majority of building and civil projects, should occur at both a strategic and activity level.

Options to handle inclement weather may range from the commonsense interpretation of applicable award and/or enterprise agreement definitions, occupational health and safety considerations including access and egress issues as well as the availability of facilities, through to management of the work. The latter may include, for example, deployment of people to unaffected areas of work or to other projects; or using the time available for other productive activities. This may include training, skills enhancement or professional development. These initiatives require co-operation between employers, management, contractors, employees and unions.

The impacts of inclement weather can be substantially reduced if the respective parties through agreements, the application of awards, and co-operative initiatives, seek to:

- minimise down time due to inclement weather so that productive work continues where possible
- enable transfer to other projects not affected by inclement weather, and
- ensure opportunities for other productive activities such as training covering first aid, occupational health safety and rehabilitation, professional development, skills enhancement initiatives are made use of to maximum benefit.

It is also important to ensure that occupational health and safety issues are systematically identified, assessed and managed during all phases of project development and delivery, refer to section 6.

Contract management 4.5

The level of expertise which is applied to the management of a project can have a significant and lasting impact on its final costs and the cost efficient delivery of government services.

The Code of Practice explicitly requires the appropriate level of expertise be allocated to service a project through all phases of procurement.

With the adoption of new approaches to private sector participation in the provision of the State's assets, for example by way of Build/ Own/Operate schemes, it is even more important that appropriate levels of professional and commercial expertise are applied to the negotiation and implementation of these non-traditional procurement packages.

5 WORKPLACE REFORM

Scope 5.1

Workplace reform is a key component of the government's construction industry reform strategy, and section 5.1 of the Code of Practice encourages contractors, subcontractors, consultants and suppliers to pursue and implement workplace reform strategies appropriate to the focus, size and capacity of the individual enterprise. These initiatives may be documented in an enterprise or project agreement.

Because workplace reform is a dynamic change process, it requires the commitment of employers, employees, unions and clients. Simply stated, workplace reform covers many complementary innovations and approaches to workplace behaviour, including:

- workplace relations and practice
- management practice
- training and skill formation
- quality management, and
- occupational health safety and rehabilitation.

Workplace reform has the potential to strengthen the construction industry's viability through productivity improvements. These productivity improvements can bring about the following positive changes for individual enterprises:

- lower production costs
- reduced waste and time lost
- better quality products and services
- a more flexible and adaptive workforce
- improved motivation, morale and commitment
- higher standards in occupational health safety and rehabilitation performance, and
- improved remuneration and/or working conditions for the workforce.

The CPSC will continue to examine further means to encourage, sustain and lead practical workplace reform on government projects. As strategies are developed and industry is consulted on the initiatives, the NSW Government Capital Project Procurement Manual will be updated.

Training and skill formation 5.2

Section 5.2 of the Code of Practice requires compliance by contractors, subcontractors, consultants and suppliers with the government's relevant training, skill formation and equal employment opportunity policies for the construction industry.

On selected projects, as identified by the Principal, contractors will be required to establish a training facility, and develop in consultation with other employers on the project, structured training and skill formation strategies which are appropriate to the needs of such project, each

employer and its employees, and including persons re-entering the workforce, where appropriate.

Training and skill formation are essential to any change process, especially as a means of maximising the skills and flexibility of the workforce, and increasing productivity and efficiency. Contractors, subcontractors, consultants and suppliers will be encouraged to pursue as may be appropriate to the focus, size and capacity of the individual enterprise and its employees competency-based training programs involving multi-skilling and skills based classifications structures.

Training and skill formation are crucial to the maintenance of a pool of skilled workers (professional, technical, trade and non-trade) both within individual enterprises and in the construction industry generally, and are central to career development. Where appropriate, training and skill formation opportunities should include: new entrants into the construction industry, persons re-entering the workforce, and women, aborigines and Torres Strait Islanders, as well as other cultural groups.

Training to improve what are termed 'soft skills' is encouraged, to enhance the skills base of individual enterprises and the construction industry generally. This may include training in:

- language, literacy and numeracy
- communication/consultation
- project planning
- plan reading
- quality concepts
- coaching
- teamwork
- problem solving
- human resource management
- contract management
- financial and general management.

The CPSC will continue to examine further strategies on training and skill formation for the construction industry and will consult with industry on any new initiative, which will subsequently be included in the NSW Government Capital Project Procurement Manual.

6 OCCUPATIONAL HEALTH SAFETY & REHABILITATION (OHS&R)

The proactive management of OHS&R is a standard requirement for all construction projects and section 6 of the Code of Practice emphasises the high priority given to OHS&R which requires compliance with legal obligations and WorkCover determinations; the provision of OHS&R induction and task training; and the orderly management of OH&S issues.

Any time spent engaging in industrial action is subject to the provisions of section 7.8 of the Code of Practice and these guidelines.

The NSW Government's guidelines on Occupational Health Safety and Rehabilitation (OHS&R) management systems in the construction industry, establish a systematic framework for management of these issues and provide a means to improve the industry's safety record.

For major and/or OHS&R sensitive projects, the government's initiative means that only those who can show they are complying with the government's requirements will have an opportunity to secure government contracts. A comprehensive OHS&R management system aims for prevention rather than correcting things when they go wrong. It eliminates hazards that cause injuries and illnesses at the workplace.

In accordance with the guidelines contained in the NSW Government Capital Project Procurement Manual, a contractor's OHS&R management system will include:

- explicit management commitment
- employee involvement
- rigorous work practices analysis
- proactive worksite analysis that anticipates and assigns roles and responsibilities and defines efficient procedures whilst on site
- hazard identification, prevention and control
- induction and task training
- appropriate case management and rehabilitation
- efficient maintenance of records.

It is imperative that an OHS&R management system is fully documented and communicated to people in an enterprise.

That means that it is organised and systematically covers the ways a contractor's own people are expected to work safely, the way the contractor will ensure others work safely and the ways they intend to get better at what they do.

For example, it is important to define roles, duties and responsibilities so that everyone knows what they have to do, when and in what circumstances.

It is expected that a contractor's OHS&R management system will show how subcontractors and suppliers are selected on the basis of their ability to deal with OHS&R issues, how they will be managed, and how their compliance is being met.

Contractors' performance will be closely monitored through regular reporting by the Principal's representatives and random audits against the documented site specific OHS&R management plans to show the systems are in fact working.

The guidelines provide the framework for development of effective programs. Advice and technical assistance can be obtained from the WorkCover Authority by organisations developing their OHS&R management systems.

Before making submissions concerning a project, tenderers should check with the relevant agency to determine whether an OHS&R management system is a tendering requirement.

OH&S induction

The provision of training, including OH&S induction, for construction personnel is a key element in an OHS&R management system framework. Advice concerning the nature and extent of induction training and/or other training programs and where to locate appropriate trainers can be obtained from the WorkCover Authority.

The WorkCover Authority is developing an industry code of practice on OH&S induction for the construction industry. Once industry is consulted on the initiative, and a code is approved by the Minister for Industrial Relations, the published code should be followed, unless there is an alternative which achieves the same or better standard of OH&S induction in the workplace.

Industry code of practice

The WorkCover Authority publishes industry codes of practice as approved by the Minister for Industrial Relations. These codes give practical guidance on how the required standard of health and safety could be achieved. They should be followed by contractors, subcontractors, consultants and suppliers unless there is an alternative course of action which achieves the same or better standard of health and safety in the workplace.

A code of practice can be used in support of the preventive enforcement provisions of the Occupational Health and Safety Act, 1983. It can also be used to support prosecution for failing to comply with or contravening the Act or Regulations.

7 INDUSTRIAL RELATIONS

Awards and legal obligations relating to employment 7.1

Awards set out the minimum conditions of employment and are legally binding on employers. All employers should be aware of the award(s), whether Federal or State to which they are bound and are to meet their award obligations regarding their employees.

Enterprise agreements, which have been approved by either the NSW or Australian Industrial Relations Commission, are legally enforceable and are to be complied with by the parties to the agreements.

Employers should also ensure compliance with all other relevant laws governing employment conditions such as: annual holidays, long service leave, workers compensation, rehabilitation, superannuation, taxation, industrial and commercial training.

Contractors are required to ensure, that their subcontractors, consultants and suppliers engaged on government projects comply with their legal obligations regarding their employees. Any information that a contractor obtains to satisfy him/herself that obligations are being met is to be obtained through proper and lawful means, and in a way that respects confidentiality.

Any instances where award or legislative obligations relating to employment have not been met are to be dealt with by government agencies through existing compliance procedures, for example: Clause 43 of AS2124-1986 and NPWC-3 (1981), General Conditions of Contract.

Liability of principal contractor to pay employees of others

'Principal contractor' means a person who has entered into a contract for the carrying out of work by another person, the subcontractor. The NSW Industrial Relations Act makes a principal contractor liable for unpaid monies where, at the time a progress payment is made by the principal contractor, a written statement has not been provided stating that: all wages due and other amounts payable under legislation, award or enterprise agreement, to employees of the employer carrying out work for the principal contractor have been paid.

Contractors and/or subcontractors who similarly engage other contractors and/or subcontractors with employees may be liable where a written statement is not obtained.

The written statement is not effective to relieve the principal contractor of the liability if the principal contractor had, when given the statement, reason to believe it was false. A subcontractor who gives the principal contractor a written statement knowing it to be false is guilty of an offence under the NSW Industrial Relations Act. Any person or organisation asked to provide a statement as a condition of getting a progress payment, should be satisfied that the statement is accurate. The requirements of the Act are not confined to employers bound by state awards.

Apart from the obligations imposed by the NSW Industrial Relations Act, government agencies as clients contractually require that prior to any progress payments being made by the client, the client requires a statutory declaration from the principal contractor that its subcontractors, consultants, suppliers and employees have been paid all moneys due and payable to them.

A person who makes a false or misleading statement may be liable to prosecution under the Oaths or the Crimes Act.

Where a contractor, subcontractor or supplier defaults due to insolvency, bankruptcy, contract determination or any other cause leaving outstanding wages and entitlements owing to its

employees, the relevant union must not seek to compel any other person to pay the entitlements unless that person is legally obliged to do so. The relevant union must not pursue any action which is inconsistent with the Code of Practice.

Advice on who may be legally obliged to pay outstanding wages and entitlements to employees, where a contractor, subcontractor, consultant or supplier is in default, should be obtained from a legal advisor and/or the NSW Department of Industrial Relations, Legal Services Branch.

Employee takeover

The practice whereby a client, Principal, contractor, subcontractor and/or any other employer is arbitrarily or automatically pressured to 'take over' the employees of a defaulting contractor, subcontractor or supplier will not be accepted on government projects and sites.

Unions should not seek to impose arbitrary or automatic 'employee takeover' where a contractor, subcontractor or supplier defaults and should recognise that there are commercial factors that need due consideration in any particular circumstance.

The relevant union whose members have been abandoned by their employer may continue to pursue appropriate employment opportunities for them in a manner which is not inconsistent with the provisions of the Code of Practice. This may include employment on merit of the existing employees of the defaulting employer by the contractor, subcontractor or supplier completing the work on the project subject to skills required, availability of work remaining on the project and satisfactory performance by the employees.

Avoidance of award or legislative obligations

Section 7.1 of the Code of Practice states that arrangements or practices designed to avoid award and/or legislative obligations are not permitted. It is the responsibility of contractors, subcontractors, consultants, suppliers to ensure that their workers are appropriately engaged and remunerated and that the appropriate taxation requirements are complied with. It should be noted that restrictions on any business's right to legitimately sublet work will not be accepted on government projects and sites.

How does one know whether a worker is an employee or a subcontractor?

The courts have attempted to define and distinguish between an employee and a subcontractor and although the courts have developed a number of tests, none is conclusive. What follows is intended as a guide only. It is therefore recommended that appropriate advice is obtained from a legal advisor and/or the NSW Department of Industrial Relations, if any doubt exists about the status of a worker.

The most important test is the control test. An employee is someone who agrees, in return for payment, to work under the direction and control of another. If, on the other hand, a worker is told what to do, but it is left up to the worker to choose how to do it, then the worker may well be a subcontractor.

For example, a bricklaying subcontractor has a number of bricklayers on his/her books. They may well be employees even if they are called subcontractors and even if they are paid on a prescribed payment system (PPS) basis.

They will probably be employees if, for instance, the bricklaying subcontractor has the right to tell them not only to erect brickwork, but also that the brickwork is to be erected by a certain gang, during certain hours, using wall ties, dampcourse and other accessories supplied by

him/her and the bricklayers work under the supervision of the bricklaying subcontractor or his/her leading hand.

If the matter is still unresolved after applying the control test, another test which may be used is the integration test.

The question to ask is whether the worker is doing the work as an individual carrying on a business on the worker's own account or is working as 'part and parcel' of a business organisation. If the worker is 'part and parcel' of a business, the worker is likely to be an employee of that business.

For example, is the worker free to accept or reject work offered by the business? If not, this indicates the worker may be an employee of that business. At the time that the worker is working for the business is the worker free to work for other contractors or subcontractors?

If not, this also indicates the worker may be an employee.

Workers - employees or subcontractors?

As already indicated, the issue of whether a worker is an employee or a subcontractor is difficult and the consequences of not making the correct determination is serious. It is therefore emphasised and recommended that appropriate advice should be obtained from a legal advisor and/or the NSW Department of Industrial Relations having regard to all of the circumstances of the particular case in question.

The following issues will be important in determining whether a worker is an employee or a subcontractor. They are offered as a guide only and are therefore not the only exclusive considerations:

- whether the provisions of State and Federal Acts and awards apply to that worker; including the relevant provisions of the *Workers Compensation Act 1987 (NSW)*
- the appropriate means of taxing that worker, and
- whether the Superannuation Guarantee Charge provisions apply.

Indications that a worker is an employee

A worker may be considered to be an employee where the following circumstances exist:

- A right to direct the worker as to how the work is to be done and the actual exercise of that right.
- The worker cannot delegate tasks. However, it should be recognised that in most employment situations, there are supervisory relationships and therefore an acknowledged capacity to delegate tasks to other workers.
- The worker is paid on a regular time basis (ie: hourly, daily or weekly).
- A workers' compensation premium is paid. Legally, an employer is liable to cover his employees for workers' compensation and may be liable for workers who are 'deemed' to be workers under the *Workers Compensation Act, 1987 (NSW)*.
- Plant, equipment and power tools are provided to the worker. Even if a worker provides his or her own basic hand tools they may still be an employee. The various building and construction awards provide for tool allowances to be paid to an employee.

- The hours of work are fixed and are reasonably regular. The more rigid the hours the more likely that the worker is an employee.
- It is contemplated that the worker will receive payments for overtime, holidays and periods of illness.
- Transport may be provided to and from the job or an allowance/fares are paid to meet transport costs.

Indications that a worker is a subcontractor

A worker may be considered to be a subcontractor where the following circumstances exist:

- The worker is free to choose how to do the work, to decline or accept work offered and to take on other work.
- The worker can delegate tasks to others of the worker's choosing.
- It is important to examine the nature of the delegation exercised rather than the mere fact of being able to delegate the work.
- The worker is paid an agreed sum, either as a lump sum, or on an instalment basis, calculated by reference to the value of the work performed.
- The worker is responsible for his/her own plant and equipment, including all tools.
- The worker can choose when to do the work, provided it is done by the time specified in the contract. Where a contract is entered into, it will contain other provisions, which together with a timeframe may be indicative of the relationship entered into.
- The worker understands that he/she is not entitled to payment for holidays or leave.
- The worker has agreed at the start of the job that he/she is a subcontractor. Nonetheless, the mere fact that the agreement calls the worker a subcontractor does not ensure that the worker is one at law.
- The worker has formed a company or partnership and dealings with the him/her are through that company or partnership.

The issue whether a worker is an employee or a subcontractor is often complex and difficult to determine. It is therefore important that appropriate advice is obtained from a legal advisor and/or the NSW Department of Industrial Relations where any doubt exists. Information about obligations in respect of workers compensation is available from the WorkCover Advisory Service.

Taxation requirements

The Prescribed Payment System (PPS) should only be used for subcontractors. If a person is at law an employee the Pay as You Earn (PAYE) system applies. The PPS is distinct from the PAYE system and it is intended that there should be no overlap between the two.

If payments are required to be paid under PPS, the PAYE provisions do not apply.

Advice on the requirements of both PAYE and PPS should be obtained from the Australian Taxation Office.

All-in payments

The term 'all-in payment' means any payment to an employee for work done that is made on an hourly, daily or weekly basis and which is in lieu of payment for all or some specific entitlements provided for by legislation and awards.

Payments to subcontractors are not 'all-in payments' in this sense. Only employees are covered by awards.

A number of subcontractors in the industry use the 'all-in payments' method of payment for their employees. Some parties within the industry object to the 'all-in-payments' system, and have agreed not to use them. Such payments can be illegal where they are used to avoid taxation obligations or to underpay employees their award and/or legal entitlements.

If in doubt it is recommended that advice be sought from a legal advisor and/or the NSW Department of Industrial Relations.

Overtime

Any policy or practice supporting 'one-in all-in' in relation to overtime is not consistent with an industry attempting to improve work practices and is not acceptable on government projects and sites.

The offer and allocation of overtime by employers should be made in a fair, non-discriminatory manner and have regard to OH&S considerations.

Redundancy

In the case of redundancies employers and unions are required to observe the principle that length of service should not be the exclusive consideration in determining who may be selected for retrenchment but one of a range of factors considered including the skills, experience and efficiency of employees, the required skills available within the existing workforce, and changes in the operational direction of the enterprise. The process of retrenchment should be conducted on a fair and non-discriminatory basis.

Enterprise agreements 7.2

Enterprise agreements provide considerable scope for employers and their employees to gain a competitive edge by increasing productivity and efficiency and improving working conditions. Section 7.2 of the Code of Practice encourages the making of enterprise agreements appropriate to the circumstances of the individual enterprise.

Enterprise agreements can be negotiated in the Australian and NSW Industrial Relations jurisdictions, but the Code prohibits contractors from directly or indirectly coercing other contractors, subcontractors, consultants or suppliers about the parties to or the content of their enterprise agreement.

Where an employer has an enterprise agreement which is in conflict with the Code, the employer cannot be awarded government work unless those conditions which conflict with the Code do not apply on government projects or sites.

In this regard, it is a requirement that all government agencies be aware of the terms of their service providers' enterprise agreements and their standing with the Code of Practice.

Overaward payments 7.3

Overaward payments by contractors, subcontractors, consultants and suppliers to their own employees are acknowledged under section 7.3 of the Code of Practice.

However, the Code prohibits direct or indirect coercion being applied by a contractor to another contractor, subcontractor, consultant and/or supplier to make overaward payments. This means that no contractor, subcontractor, consultant or supplier is allowed to enter into any agreement or issue a contract or subcontract or 'industrial instruction' that directly or indirectly binds or otherwise pressures or coerces another contractor, subcontractor, consultant and/or supplier into making overaward payments.

The only exception to the above, is where there is a project agreement, as outlined in section 7.4 of the Code, which provides

for special payments, conditions and/or benefits to be applied on a site-wide basis. In such a situation the contractor, subcontractor or supplier may be required to comply with the terms of the project agreement.

Where unregistered industry agreements conflict with the Code of Practice, the latter shall prevail.

Project agreements 7.4

Project agreements, as outlined in section 7.4 of the Code of Practice, will only be appropriate for major contracts, as defined by the Principal from time to time.

Typically, major contracts will have some or all of the following features: an extended construction period, high cost, identifiable contract packages within an overall program of works, rapidly changing technology, particular skill formation strategies, special industrial requirements, and presence of both private and public sector projects/investments.

Project agreements incorporating special site-wide payments, conditions and/or benefits should only be approved by the Principal where these are related to time and/or cost saving performance to the benefit of the Principal.

'Principal' here means the government agency responsible for the project initiative or scheme, irrespective of whether there is a contract between the Principal and another party. For example, in a Build/Own/Operate/Transfer (BOOT) scheme, there may not be a construction contract with the relevant government agency but the government agency will still retain the right in consultation with the relevant party to the BOOT scheme to authorise the negotiation of a project agreement.

Where a contractor or group of contractors wish to negotiate a project agreement to regulate special payments, conditions and/or benefits for more than one contractor, the strategy must first be discussed with and authorised by the Principal before the commencement of work.

Subcontractors should be involved wherever practical in the process of developing a project agreement prior to any agreement being finalised.

The integrity of individual enterprise agreements must be maintained. Therefore, the project agreement should not require employers with their own enterprise agreements in place to make payments and/or provide benefits which would result in 'double-dipping'.

The parties to a project agreement cannot use any term in the project agreement for a precedent on any other project or for any other purpose.

In deciding whether to approve a project agreement, the Principal should assess:

- the degree of commitment demonstrated by the parties to the proposed agreement to improving productivity and industrial relations
- past performance and the parties' history of maintaining agreements
- the manner in which the proposed project agreement will interface with individual enterprise agreements, and
- whether there is anything in the proposed agreement which is inconsistent with provisions of the Code of Practice.

It is preferable that project agreements be certified and/or registered under either the Australian and/or NSW Industrial Relations Acts.

Site allowances 7.5

Consistent with the provisions of section 7.5 of the Code of Practice contractors, subcontractors, consultants and/or other employers engaged on government projects or sites must have site allowances claims arbitrated before an Industrial Relations Commission. The Australian Industrial Commission does not deal with such claims.

It is acknowledged that, if a site allowance has been awarded by the NSW Industrial Relations Commission it must be paid by the affected employer.

It should be noted that site allowances will not be reimbursed by the Principal.

Site allowances should not be confused with enterprise based payments or special payments in project agreements.

Membership of registered organisations 7.6

The Code of Practice at section 7.6 provides that willing membership of unions and employer associations is encouraged through proper and lawful means. This means that victimisation, through any mechanism, for membership or non membership of organisations is precluded.

Employers, unions and employer associations are required to observe and comply with the applicable provisions of either the Australian and/or NSW Industrial Relations Acts or the *Occupational Health and Safety Act, 1983* (and Regulations) as appropriate.

Construction sites usually involve a number of employers - some of whom are bound by national awards and some of whom are bound by State awards. The requirements of the applicable award and/or enterprise agreements or legislation must be observed by unions and employers in respect of:

- right of entry by authorised union officers, and
- in relation to the inspection and availability of the relevant employees' records to the relevant union(s) by the relevant employer(s).

Dispute settlement 7.7

Grievances and/or matters under dispute are to be dealt with at their source between the appropriate level of management and employee(s) and/or union representatives with graduated steps for discussion involving higher levels of authority should the dispute not be resolved.

As indicated in section 7.7 of the Code of Practice, the process outlined in the applicable award, and/or enterprise or project agreement must be observed by all parties.

Reasonable time limits should be allowed for each stage of the process. If the matter is not resolved, then an application should be made to the appropriate Industrial Relations Commission for settlement.

All parties to the dispute are required to comply with industrial tribunal decisions, subject to any legal appeal rights. While the dispute settlement procedures are being followed:

- no industrial action is to take place
- the status quo that existed prior to the dispute must prevail, and
- work is to continue normally, without prejudice to any of
- the parties.

Section 6.3 of the Code of Practice also provides a mechanism for the management of OH&S issues.

Strike pay 7.8

Section 7.8 of the Code prohibits contractors, subcontractors, consultants and suppliers from paying employees for any period during which they are engaged in any form of industrial action including: strikes, stopwork meetings not authorised by the employer, bans and restrictions or limitations on work; unless such pay is authorised by the relevant Industrial Relations Commission.

Both the Australian and NSW Industrial Relations Acts allow the relevant Commission to deal with claims for payment for time spent in industrial action due to a legitimate safety grievance.

Under the Code of Practice, the relevant Industrial Relations Commission must make this determination before workers can be paid. The Australian and NSW Industrial Commissions will only approve such payment where the claim is legitimate and where the payment is for those workers directly affected by the health or safety issue.

Industrial impacts - reporting to the Principal 7.9

Any disputes or disagreements, relating to industrial relations and/or occupational health and safety matters, which can impact on the construction program and/or the contract, project costs or other related contracts, must be reported to the Principal at the earliest opportunity. To ensure this, an effective and clear reporting structure must be established at an early stage in any project. This will provide the government agency with the opportunity to:

- provide assistance to contractors where appropriate in resolving disputes or disagreements, and
- assist with managing their own overall works program more effectively.

Any actual or threatened industrial action arising from the Code's implementation must be reported by the government agency to the Department of Industrial Relations (DIR). Individual government agencies are expected to put in place internally coordinated arrangements which ensure effective communications with the DIR.

8 COMPLIANCE

NSW Government policy 8.1

The NSW Government is committed to the implementation of the Code of Practice and the associated Code of Tendering.

Breaches of the Codes by industry, as may be evidenced through non-compliance, lack of commitment or unethical activity, may result in sanctions as outlined in section 8 of the Code of Practice being exercised. Where the breach involves any law or statute, the matter will be referred to the relevant enforcement agency.

In the case of serious breaches, such as in the case of collusive tendering practices, government-wide sanctions will be applied.

In considering and implementing sanctions at an agency level, individual agencies must use procedures similar to those outlined in the following sections.

Enforcement 8.2

Government agencies as clients.

Monitoring the application of the Code of Practice and the Code of Tendering will be undertaken as part of the relevant agency's mainstream business function. However, to facilitate industry accessibility, each agency will:

- establish internal co-ordination procedures for managing Code(s) matters
- establish and advertise a central point of contact.

Occurrences of a breach

Any alleged breach of the Codes must be notified to the relevant government agency. It is then the agency's responsibility to assess the nature and extent of the breach. Where the preliminary assessment indicates that the breach may warrant any form of sanction, the particulars of the breach must be supported by statutory declaration by the party or parties making the allegation.

On receipt of the statutory declaration, the government agency should formally advise the organisation alleged to be breaching the Code of the nature and extent of the allegations, and request that they show cause as to why the government agency should not regard the conduct as a breach.

The organisation in question should also be advised that unless a satisfactory reply is provided within ten (10) working days, the sanction provisions of the Codes will be considered.

Application of sanctions

In the first instance, it will be the affected agency which will assess the nature and extent of the alleged breach, and decide whether or not a sanction should be applied. However, for repeated or serious breaches any action proposed to be taken should be implemented only after consultation with the CPSC.

The procedure adopted in the assessment of an alleged breach should reflect those outlined in the following section 'Assessment of proposed government-wide sanction'.

Construction Policy Steering Committee (CPSC)

Role

The CPSC is responsible for the development of consistent construction, consultant and contractual policies to be implemented by government agencies. In this context the CPSC co-ordination role includes overall monitoring of the Code of Practice and the Code of Tendering to ensure they are being consistently applied across government projects.

Central point of contact

The CPSC Secretariat will act as a central point of contact and advice in respect of both Codes.

Agency reporting to CPSC

As a general rule, minor breaches need not be reported to CPSC. However, more serious or repeated breaches require careful consideration and must be reported to the CPSC to enable the committee to facilitate consistent overall implementation of the Codes.

Proposing government-wide sanctions

When a government agency seeks imposition of government-wide sanctions, the agency must register the proposed complaint with the CPSC, under the signature of the agency's Chief Executive Officer. The referral is to be fully documented, and include:

- details of the circumstances and extent of the breach or breaches
- a copy of the written information/advice given to the affected party by the government agency specifying the alleged breach
- the response of the affected party, and
- a proposal as to an appropriate sanction in terms of both degree and duration.

In addition, if the CPSC becomes aware of a contractor, subcontractor, consultant or supplier who continuously breaches the Codes, then the matter can be referred (independent of an agency recommendation) to the appropriate subcommittee of the CPSC for consideration of a sanction.

Assessment of proposed government-wide sanction

Proposals for government-wide sanctions will be investigated by a CPSC sub-committee specifically established for that purpose.

The investigation as to whether or not a government-wide sanction should be applied is to be completed and a recommendation prepared within ten working days following referral of the documentation outlined above to the sub-committee.

Representations

The CPSC must provide to the party alleged to have breached the Code, a copy of the sub-committee's recommendation prior to its consideration and allow the party a period of ten working days (from the provision of the recommendation) in which to make written representations in respect of it.

The copy of the recommendation must be accompanied by details of how and where the response is to be lodged.

If no representations are received, the recommendation will be automatically considered by the CPSC.

Assessment of representations

If representations which seek a review of the recommendation to apply a government-wide sanction are received, the CPSC will consider these by:

- Arranging for a review by an independent individual, of high community standing and expertise. This person will be proposed by the CPSC and agreed to by the party alleged to have breached the Code. If agreement is not reached the CPSC will appoint an independent person for a review. Such a person may be nominated by a recognised ADR organisation.
- The independent reviewer shall report on the following matters:
 - ◆ whether, in fact, there was non-compliance with the Code and the extent of the non-compliance, and
 - ◆ whether the requirements of procedural fairness were observed.

This review will be completed within ten days of appointment of the independent reviewer.

Final decision and advice

A final decision regarding the application of a government-wide sanction will be made by the CPSC.

The quorum for these decisions will comprise three Chief Executives of the peak body of CPSC agencies. However, the quorum will specifically exclude representation by the agency alleging the breach.

If the CPSC disagrees with the sanction proposed by the agency, the Chief Executive Officer of that agency will be advised of the reasons for disagreement and the sanction/action considered appropriate from a government-wide perspective.

When a government-wide sanction is applied, the affected party and agency will be advised in writing by the CPSC of the following:

- the form of sanction to be applied
- the time-span of the sanction
- steps which should be taken by the affected party to restore their standing within government including, but not restricted to, those actions by the party which will clearly demonstrate that offending practices have been discontinued and that adequate policies, procedures and standards have been instituted to prevent a recurrence of a similar breach or breaches, and
- specification of the earliest review date and particulars of the body and procedures for carrying out such reviews.

NSW Police Service

Section 8.2 of the Code of Practice refers to the role of the NSW Police Service, which will focus on eliminating illegal and corrupt practices where these are found to exist in the construction industry.

The Commissioner of Police has nominated liaison officers to receive complaints concerning fraud, false statutory declarations or other illegal or corrupt practices. Those officers can be contacted at the address provided in section 10 of this document.

The police liaison officers will assess complaints received and forward these to the appropriate operational area, which may include the Fraud Enforcement Agency for investigation. The NSW Police Service will maintain a central register of all complaints for assessment and tracking.

Breaches by an agency and agency employees

A number of avenues are traditionally available to private sector individuals wishing to raise issues associated with the performance of government agencies. This includes representations to Government Ministers, Members of Parliament, the Ombudsman, etc.

These mechanisms remain available, but the following procedures have also been established to ensure consistency with the government's wider reform program for the construction industry:

- If reported breaches are attributable to an agency's policies, practices and/or procedures, then appropriate changes will be made.
- If the reported breach has resulted from activities of an individual, in contravention of the agency's policies, practices and/or procedures, consideration will be given to appropriate disciplinary action in accordance with that agency's normal practices.

Any reported breach by an agency needs to be fully documented, and include:

- details of the circumstances and extent of the breach or breaches, and
- a copy of any written information/advice exchanged with the agency.

To assist in these procedures, the following tiered reporting structure at lower levels has been established. In general all issues should firstly be dealt with at lower levels.

Level 1 - Reporting direct to the agency's Chief Executive Officer

The option of resolving any non-compliance should be fully pursued with the agency concerned. The government has made adherence to the Codes a key determinant of agency performance.

CEOs are responsible for ensuring their agency's performance is wholly consistent with the government's requirements.

Level 2 - Reporting to the Minister responsible for the agency

If a reported breach cannot be resolved within an agency, the matter should be referred to the Minister responsible for that agency.

Level 3 - Reporting to the Premier

Individuals always have the option of referring matters which cannot be resolved to the Premier. However, this option should only be pursued when Level 1 and Level 2 options have been exhausted.

Role of industry 8.3

Employer and industry associations and unions

Section 8.3 of the Code of Practice has also included a role for employer and industry associations, and unions to ensure compliance by their members with the Code.

Confirmed breaches will be referred to the relevant organisation for action under its rules or code of practice or conduct. Such action will be in addition to any action or sanction deemed appropriate by the CPSC.

9 CONSTRUCTION POLICY STEERING COMMITTEE MEMBER AGENCIES

Member agencies and their representatives as at July 1, 1996 are:

Mr A Griffin Mr E Smithies
Chair Executive Director
Construction Policy Steering Committee
Level 23 Mc Kell Building
2- 24 Rawson Place
SYDNEY NSW 2000
phone (02) 9372 8885 fax (02) 9372 8822

Mr P Gallagher
Roads & Traffic Authority
Level 6 Centennial Plaza
260 Elizabeth Street
SYDNEY NSW 2000
phone (02) 9218 6400 fax (02) 9218 6980

Mr G Donnison
Department of Industrial Relations
Level 9
1 Oxford Street
SYDNEY NSW 2000
phone (02) 9266 8311 fax (02) 9266 8078

Mr J Pash
Treasury
Level 26 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
phone (02) 9228 5209 fax (02) 9228 4184

Mr R Tracey
Sydney Water Corporation
Level 12 115-123 Bathurst Street
SYDNEY NSW 2000
phone (02) 9350 5633 fax (02) 9350 6080

Mr I Stuart
Pacific Power
Level 20 Electricity House
Corner Park & Elizabeth Streets
SYDNEY NSW 2000
phone (02) 9268 8193 fax (02) 9268 6141

Mr J Koutsis
State Rail Authority
Level 7
11-31 York Street
SYDNEY NSW 2000
phone (02) 9224 4502 fax (02) 9224 4154

Ms L Hurst
The Cabinet Office
Level 38 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
phone (02) 9228 4785 fax (02) 9228 4242

Mr I Matthews
Department of Housing
23-31 Moore Street
LIVERPOOL NSW 2170
phone (02) 9821 6001 fax (02) 9821 6448

Mr A Griffin
Department of Public Works and Services
Level 23 McKell Building
2-24 Rawson Place
SYDNEY NSW 2000
phone (02) 9372 8812 fax (02) 9372 8844

10 NEW SOUTH WALES POLICE SERVICE LIAISON OFFICERS

The Commissioner of Police has nominated the following liaison officers to receive complaints concerning fraud, false statutory declarations or other illegal or corrupt practices.

Chief Superintendent J Ure
State Intelligence Group
Level 3 Prince Alfred Park Building
219-241 Cleveland Street
Strawberry Hills 2012
phone (02) 9384 6566 fax (02) 9384 6556

Assistant Commissioner D Gilligan
Region Support Command
Level 7 Sydney Police Centre
151-241 Goulburn Street
Surry Hills NSW 2010
phone (02) 9265 4295 fax (02) 9265 4922

Mr Ure should be contacted in the first instance. Complaints received will be assessed by the Liaison Officers and forwarded to the appropriate operational area, which may include the Fraud Enforcement Agency, for investigation.