



Express law

fast track information for clients

6 August 2009

Updated construction industry guidelines now in effect

An updated version of the Australian Government [Implementation Guidelines for the National Code of Practice for the Construction Industry \(Guidelines\)](#) together with updated [Model Tender and Contract Documentation \(Model Clauses\)](#) have been released by the Department of Education, Employment and Workplace Relations (DEEWR) and are effective from 1 August 2009.

This *Express Law* outlines some of the more significant changes contained in the updated Guidelines.

Background

The updated Guidelines have been amended to align with the new *Fair Work Act 2009* (Cth) (FW Act), some of the suggestions of the Hon. Murray Wilcox QC made in his report 'Transition to Fair Work Australia for the Building and Construction Industry' (March 2009), and the extensive consultation undertaken by the government with industry and interested parties.

Application

The updated Guidelines apply to all construction projects where expressions of interest or tenders are let for the first time on or after 1 August 2009. Projects commenced before this date will continue to be subject to the relevant previous version of the Guidelines.

The types of construction work to which the National Code of Practice for the Construction Industry (Code) and the Guidelines apply have not changed.

'Funding Entity', being the bodies to whom the updated Guidelines apply, is now defined to include:

- all departments of state, departments of the parliament and prescribed agencies named in the *Financial Management and Accountability Regulations 1997*
- all the Commonwealth authorities and wholly-owned Commonwealth companies required by a General Policy Order, issued under s 48A of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), to apply the Code and Guidelines.

The inclusion of only CAC Act bodies under a General Policy Order in the definition is a different approach to the mechanism prescribed in the previous version of the Guidelines. That version provided that the Guidelines applied to all CAC Act bodies, except those which had secured an exemption.

Code monitoring

The roles of the DEEWR, the Code Monitoring Group (CMG), the Department of Finance and Deregulation (Finance) and the Office of the Australian Building and Construction Commissioner (ABCC) have been refined in the new version of the Guidelines. In particular, there is a more comprehensive description of some of the functions of the ABCC.

The new Guidelines also expressly refer to the Australian Government's intention to transfer all functions of the ABCC to the Fair Work – Building Industry Inspectorate on 31 January 2010, subject to the passage of necessary legislation.

Workplace arrangements

A number of changes in the updated Guidelines will require a change of approach by construction industry employers in their workplace arrangements:

- There is a stronger focus on complying with obligations under the relevant workplace relations arrangements and legislation, and the *Fair Work Act 2009* in particular.
- The majority of the additional requirements in the previous Guidelines that were above and beyond the applicable legislative requirements have been removed.

Funding entity responsibilities and new Model Clauses

Requirements in tender and contract documents

As with the previous version of the Guidelines, Funding Entities need to make it clear in tender and contract documentation that the Code and Guidelines apply to the project and that compliance by contractors is mandatory.

New Model Clauses

To assist Funding Entities to meet their obligations under the Code and the updated Guidelines, DEEWR has released new Model Clauses which are available at deewr.gov.au/building.

Tender and EOI evaluation

As with previous versions of the Guidelines, where the Code and Guidelines apply, only companies and contractors who are compliant can undertake building and construction work for funded projects. But the updated Guidelines now expressly provide that a Funding Entity must not consider expressions of interest or provide work to entities:

- which have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and have not paid the claim, or
- have been assessed as non-compliant by DEEWR.

While noting that value for money is the core principle for Australian Government procurement, the updated Guidelines now state that preference may be given to tenderers which demonstrate commitment to:

- adding and/or retaining trainees and apprentices
- increasing the participation of women in all aspects of the industry, or
- promoting employment and training opportunities for Indigenous Australians in regions where significant Indigenous populations exist.

The updated Guidelines state that Funding Entities have the capacity to waive elements of the Guidelines based on a public interest test where:

- the project is urgently required, or
- no suitable compliant tenderer is identified through a competitive tender process.

In these circumstances, the scope of elements to be waived must be determined and documented for each project. Further, some elements cannot be waived, including:

- project monitoring and reporting requirements
- acceptance of the sanctions regime.

Code, Guidelines, Model Clauses and related information available at:
deewr.gov.au/building

For further information, including assistance in updating precedent grant and procurement documentation, please contact:

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