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Western Australian Building and Construction Industry Code of Conduct 2016 and Implementation Guidelines

SUMMARY

The Western Australian Government has introduced a Construction Industry Code of Conduct and associated Implementation Guidelines effective from 1 January 2017.

The Code and Guidelines apply to all State Government funded building work and impact on building contractors and their subcontractors.

Overview

The Western Australian Government has released the [Western Australian Building and Construction Industry Code of Conduct 2016 \(BCI Code\)](#) and associated [Implementation Guidelines](#).

The Code will apply to all public building work in Western Australia with a value of over \$10 million from 1 January 2017. The Government intends to extend the application of the Code to other public works at a later stage.

A building contractor becomes covered by the Code upon submitting a response to a tender process for State “building work”. Once covered by the Code, the contractor remains covered for the duration of the tender period and, if successful, the duration of the term of the contract.

In addition, while covered, the building contractor must comply with the Code on privately funded construction work.

The Code and Guidelines apply solely to on-site activities and building work performed on an auxiliary or holding site.

Who is a Building Contractor?

A **building contractor** is a person who has entered into, or who has offered to enter into, a contract for services under which the person:

- carries out building work; or
- arranges for building work to be carried out.

What is Building Work?

The definition of “building work” in the Code (Schedule 1) is the same as the definition of “building work” in s.6 of the [Building and Construction Industry \(Improving Productivity\) Act 2016](#) except for:

- the transport and supply work described in s.6(1)(e) of the Act; and
- the off-site prefabrication of made-to-order components to form part of any building, structure or works, as described in s.6(1)(d)(iv), unless that work is performed on an auxiliary or holding site that is separate from the primary construction site or sites.

Is maintenance work covered under the definition of “building work”?

Where a contract provides for both a construction and ongoing maintenance package, the “building work” ceases upon practical completion of the construction phase.

Where a contract is for small maintenance projects, the Building and Construction Code Monitoring Unit (**BCCMU**), will make the determination of coverage based on:

- whether the package of work is repair or maintenance; (Note: If the contract involves keeping the structure working in its existing state such as routine or scheduled maintenance, then it is unlikely to be defined as “building work”);
- the scale and complexity of the project.

Members are advised to seek a determination from the BCCMU on whether maintenance work undertaken is “building work” or not.

Compliance and monitoring

The BCCMU undertakes the BCI Code monitoring and compliance activities. It has the power to undertake site visits, auditing, and inspections of records and documents.

The BCCMU will report findings of material BCI Code non-compliance and all proven breaches to the Minister for Commerce.

Building contractors must assist, permit and allow the BCCMU to: access their building work and any premises where records and documents are kept, and to interview employees and contractors.

Subcontractor compliance

A compliance requirement under the BCI Code which applies to a building contractor also applies to its subcontractors.

Reasonable steps must be taken to ensure that subcontractors and other building industry participants comply with the BCI Code while they are undertaking building work subject to the Code.

Building contractors should ensure that their contracts and related documents reflect the requirement to be Code-compliant.

Sanctions

The BCCMU will provide the Minister of Commerce with a Draft Compliance Report where it has determined that there is a material failure to comply.

Where the report is accepted by the Minister, the finding may adversely affect the prospects of, or prevent, the building contractor and its related entities being awarded contracts for State building work.

Notifications to the BCCMU

A Building Contractor, whilst covered by the BCI Code:

1. must advise the BCCMU in writing when building contracts in excess of \$2 Million are executed; and
2. must notify the BCCMU of a breach or suspected breach of the Code as soon as practicable, but no later than 48 hours of becoming aware of the breach or suspected breach.

Legal obligations relating to employment and engagement

A building contractor and subcontractors must comply with all designated building laws, industrial instruments, and court and tribunal orders, directions and decisions.

A party must not enter into arrangements, contracts or practices to avoid its legal obligations, or the legal obligations of others, including arrangements or practices that:

- are sham contracting arrangements;
- are designed to provide for harsh and unfair contracts; or
- require or unduly influence or pressure a subcontractor to have particular workplace arrangements, or to make above-entitlement payments, or to contribute to a particular redundancy or superannuation fund.

A party must take all reasonable steps to ensure that there is no engagement of people who have no lawful right to work in Australia.

Unregistered written agreements

A party must not bargain or enter into an unregistered written agreement. The exception is that a party may bargain and enter into a common law agreement or flexibility arrangement between itself and an individual employee. An employer can make multiple individual common law agreements, provided the employer genuinely negotiates directly with each employee.

Workplace arrangements

A building contractor must have a Workplace Relations Management Plan (**WRMP**), in place prior to commencing work for any State building work exceeding \$10 million in value. The WRMP must address a series of specified requirements that are set out in the Code.

Dispute settlement

The BCI Code contains detailed requirements concerning dispute settlement.

Industrial action

The BCI Code requires contractors to take all steps to prevent or bring to an end unprotected industrial action, including by pursuing legal action where possible.

Freedom of association and right of entry

The BCI Code requires contractors to adopt policies that promote freedom of association. The Code identifies a list of practices which are inconsistent with the freedom of association requirements.

The Code specifies that a building contractor must strictly comply with all laws of the Commonwealth and the State of Western Australia in relation to right of entry.

Entry by a union official must be for a purpose for which right of entry could be exercised by the permit holder and the permit holder complies with applicable industrial and health and safety laws including permit and notice requirements.

Security of Payments

Building contractors must comply with relevant laws pertaining to security of payments and ensure that payments are made in a reasonable and timely manner. All disputes about payments must be resolved in a reasonable, timely and consultative way.

Collusive tendering

Collusive conduct is prohibited in relation to tendering.

Do you require further advice?

For information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.

Should you require any detailed advice on the Code-compliance, enterprise agreements, union issues or any other workplace relations matters, [Ai Group](#) and [Ai Group Workplace Lawyers](#)' team of professional workplace relations advisers and lawyers are available to assist you.



Stephen Smith
Head of National Workplace Relations Policy