

Review of Australian Ethical Procurement Principles

The research described in this report was carried out by:

Project Leader	Adrian Kirk
Team Members	Marcus Jefferies Jamie Mackee Debbie Smit
Researchers	Andrew Hampson Judith McCann Paul Smith
Project Affiliates	Jeff Horsley, John Holland Roger Frith, Building Commission Victoria Don Allan, Queensland Department of Public Works John Oliver, Rider Hunt
Program Name:	Business & Industry Development
Project No.:	2002-062-A
Project Name:	Ethical Behaviour in the Construction Procurement Process

REVIEW OF AUSTRALIAN ETHICAL PROCUREMENT PRINCIPLES

'The building and construction industry is critical to welfare and prosperity in Australia. The total production of the industry in 2001-2002 was \$59.7 billion. In 2001-02 it directly accounted for 5.5 per cent of Australia's gross domestic product, and 7.5 per cent of employment. Indirectly it has a much greater impact. Every Australian business, and every Australian citizen, uses the built environment.' (Cole, 2003, p.3) As major clients of the industry Governments are providing leadership in effecting major improvements in the way business is conducted, encouraging changes in industry production processes to raise productivity, and other actions that will help develop an industry which achieves internationally-competitive standards. (Australian Procurement and Construction Council Inc. and the Department of Labour Advisory Committee, 1997, p.1) By developing codes of practice, Governments can develop and encourage ethical behaviour in the tendering process.

National Code of Practice for the Construction Industry (NCOP)

In 1997 the Australian Procurement and Construction Council Inc. (APCC) and the Department of Labour Advisory Committee (DOLAC) formulated then published the NCOP. This code set out eight national principles concerning future practices in the construction industry for the client and tenderer. They can be summarised as:

- 'Clients' rights and responsibilities
- Relationships
- Competitive behaviour
- Continuous improvement and best practice
- Workplace reform
- Occupation Health, Safety and Rehabilitation (OHS&R)
- Industrial Relations and Workplace Reform
- Security of Payment' (APCC and DOLAC, 1997, Contents)

Having outlined eight core principles for the construction industry in the NCOP, the APCC expanded on each principle. The principle concerning ethical tendering was outlined in the principle of competitive behaviour. Competitive behaviour provides the potential for unethical practices to occur, whether it is in the tendering or construction phase of the project. The NCOP set out nine key ethical principles to ensure ethical behaviour occurred at all stages of the project by all parties. They are:

- That '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 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 selection 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' (APCC and DOLAC, 1997, p.4)

Collusion can involve many forms of improper practices. The NCOP outlined some prohibited practices. They include:

- '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 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' (APCC and DOLAC, 1997, p. 4-5)

The Commonwealth, State and Territory Governments developed the code NCOP. Being a national code, the Commonwealth government requires all parties working on government construction projects to comply with the ethical principles outlined in the Code. The State and Territory governments agreed to use this Code on their construction projects as a minimum requirement with the latitude to add to the compliance requirements relevant to that State or Territory.

New South Wales

The NSW Government extensively sets out the requirements of clients and tenderers in doing business with the government. They have published the:

- Code of Practice for the Construction Industry (NSWCOP)
- Code of Tendering for the Construction Industry (NSWCOT)
- Implementation Guidelines for the Code of Practice and Code of Tendering
This publication 'expands on key aspects of the NSW Government's *Code of Practice* and *Code of Tendering for the Construction Industry* with the objectives of ensuring uniform implementation.' (New South Wales, Construction Policy Steering Committee, 1996)
- Capital Project Procurement Manual

The NSWCOP and the NSWCOT define ethical principles to be adhered to by all parties in the tendering process. The principles set down in the NSWCOP are the same as those in the NCOP. The ethical principles in the NSWCOT contain the same nine principles as well as the principle 'parties must not seek or submit tenders without a firm intention to proceed'. (New South Wales, Construction Policy Steering Committee, 1996a)

Victoria

The Victorian Government has published the Code of Practice for the Construction and Building Industry (VCOP). 'The Victorian Government supports the national approach for the development of the construction industry. This has been reflected in its endorsement of the (NCOP)'. (Department of Infrastructure, 1999, p.3) The publication contains a section called the Selection of Contractors. This section contains six subsections. Within three of these subsections: General principles; Obligations of clients; and Obligations of contractors, without defining them as ethical principles, the nine ethical principles set out in the NCOP can be found. A principle not contained in the NCOP is 'have regard to the cost of tendering and seek to constrain such cost' (Department of Infrastructure, 1999, p.19)

South Australia

The South Australian government published, in March 2003, the Code of Practice for the South Australian Building and Construction Industry (SACOP). 'This revised code is consistent with and adopts the principles which the Commonwealth, State and Territory Governments have agreed should underpin the future development of the construction industry in Australia.' (Construction Industry Forum, Department for Administrative and Information Services and the Government of South Australia, 2003) The ethical principles in tendering are outlined in a section called Tendering Processes. 'The best practice principles that this Code adopts reflect those identified in the Australian Standard (AS 4120-1994).' (Construction Industry Forum, Department for Administrative and Information Services and the Government of South Australia, 2003, p.8) As well as containing the ethical principles outlined in the NCOP, the requirements to:

- 'refrain from seeking or submitting tenders without a firm intention to proceed ...
- constrain the cost of bidding
- recognise that tenderers retain their right to intellectual property, unless otherwise provided in the contract;
- not conduct post-tender negotiations solely on price. Neither clients nor contractors shall seek to trade off different tenderers' prices against others in an attempt to seek lower prices' (Construction Industry Forum, Department for Administrative and Information Services and the Government of South Australia, 2003, p.8)

are also included in the SACOP.

Comment [AH1]: In March 2003, the South Australian Government published the Code of Practice for the South Australian Building and Construction Industry (SACOP)

Queensland

The Queensland Government published the Queensland Code of Practice for the Building and Construction Industry (QCOP) in August 2000. The publication contained a section called Tendering Ethics. The ethical principles outlined in the section are based on the Australian Standard Code of Tendering (AS 4120 – 1994). The QCOP makes no reference to the NCOP. The ethical principles outlined in the QCOP contain all the ethical principles outlined in the NCOP except 'parties must not engage in any practice which gives one party an improper advantage over another' (APCC and DOLAC, 1997, p.4) The QCOP contains the following ethical principles not contained in the NCOP:

- 'the Principal shall have regard to the cost of tendering and the number of tenderers, recognising that the cost of tendering is a significant industry overhead;
- tenderers shall only tender when they intend to carry out the work;
- The Principal shall call for tenders only after the Principal has arranged funding for the project and has made a firm commitment to continue with the project;
- ... when documents are altered, sufficient time shall be allowed for all tenderers to review and revise their tenders;' (Queensland Government, 2000, p.9-10)

Comment [AH2]: In August 2000 the Queensland Government published the Queensland Code of Practice for the Building and Construction Industry (QCOP).

Tasmania

The Tasmanian Government published the Public Works Tender Guidelines in October 1997. In 1998 the Tasmanian Government published a document titled Tasmanian Annexure to the National Code of Practice for the Construction Industry. In it was stated, 'The Tasmanian Government is committed to the implementation of this Code. Compliance with this code shall be a condition of tender for all Tasmanian Government construction projects.' (Department of Treasury and Finance, 1998) Prior to this statement the government published the Tasmanian Government Code of Practice for the Construction Industry. These guidelines required 'compliance with the Australian Standards Code of Tendering AS 4120 – 1994.' (Department of Treasury and Finance, 1997, p.10)

Western Australia

In January 2002 the Western Australian Government published a revised Code of Practice called Code of Practice for the Building and Construction Industry in Western Australia (WACOP). The WACOP does not mention the NCOP. There is not a section devoted to ethical principles but rather a section dealing with Tendering practices and subsections that look at Calling of tenders and Collusive tendering. The majority of ethical principles outlined in the NCOP are covered in the two subsections. The following are absent:

- 'parties must conform to all legal obligations
- parties must not engage in any practice which gives one party an improper advantage over another
- ... (tenderers) ... must be prepared to attest to their probity
- evaluation of tenders must be based on the conditions of tendering and selection criteria defined in the tender documents
- any party with a conflict of interest must declare that interest as soon as the conflict is known to that party' (APCC and DOLAC, 1997, p.4)

The 'ethics and procedures defined in the Australian Standard Code of Tendering AS 4120 ... do apply' (Government of Western Australia, 2002, p.13) While no direct principle dealing with legal obligations is defined, one of the objectives of the WACOP is to 'encourage industry participants to comply with the spirit and intent of all laws relating to the industry'. (Government of Western Australia, 2002, p.2)

Australian Capital Territory

'The National Construction Code applies in the Australian Capital Territory.' (Codes of Practice for the Building and Construction Industry, Discussion Paper Eight, 2002, p.27)

Northern Territory

The Northern Territory Government published the Northern Territory Procurement Code (NTPC) in May 2003. 'The NTPC is the NCOP adapted for specific application in the Northern Territory.' (The Northern Territory Procurement Code, 2003) The ethical principles outlined in the NCOP are the same as those in the NTPC.

Conclusion

The Commonwealth, State and Territory Governments are major clients of the construction industry. By adopting a common Code of Practice for the industry participants and requiring compliance with the principles set out in the Code would go a long way to achieving the Code's objectives.

This examination of the ethical principles required in the tendering process, set out in the Codes of the Commonwealth, State and Territory Governments, shows commonality between the Government Codes. Using the NCOP as a base to work off, some of the State Governments go further in defining ethical principles to comply with. By adopting the NCOP as a template to work from, achieving ethical practices in the procurement of construction projects is well advanced if compliance is enforced.

References

- Australian Procurement and Construction Council Inc and Department of Labour Advisory Committee, 1997, *National Code of Practice for the Construction Industry*
<http://www.apcc.gov.au/docs/code_of_practice.pdf>
- Cole, February 2003, *Final Report of the Royal Commission into the Building and Construction Industry, Volume One, Summary of Findings and Recommendations*,
<http://www.royalcombcj.gov.au/docs/finalreport/V01Summary_PressFinal.pdf>
- Construction Industry Forum, Department for Administrative and Information Services and the Government of South Australia, March 2003, *Code of Practice for the South Australian Building and Construction Industry*,
<<http://www.constructionsa.com.au/html/news/code/Code%202003-e3.pdf>>
- Department of Finance and Treasury, November 1998, *Tasmanian Annexure to the National Code of Practice for the Construction Industry*,
<[http://db.purchasing.tas.gov.au/domino/bfg.nsf/3AA09629C7C79D1ECA256C980016670E/\\$FILE/Annexure+to+Code+of+Practice.pdf](http://db.purchasing.tas.gov.au/domino/bfg.nsf/3AA09629C7C79D1ECA256C980016670E/$FILE/Annexure+to+Code+of+Practice.pdf)>
- Department of Infrastructure (Victoria), March 1999, *Code of Practice for the Building and Construction Industry*,
<http://www.buildingcommission.com.au/asset/1/upload/Code_of_Practice_Building.pdf>
- Government of Western Australia, January 2002, *Code of Practice for the Building and Construction Industry*,
<http://www.docep.wa.gov.au/default_lr.asp?id=lr/publications/index&menu=lr_publications>
- New South Wales, Construction Policy Steering Committee, July 1996, *Implementation Guidelines for the Code of Practice and Code of Tendering*,
<<http://www.construction.nsw.gov.au/docs/codes/impguide.pdf>>
- New South Wales, Construction Policy Steering Committee, July 1996, *Code of Practice for the Construction Industry*,
<<http://www.construction.nsw.gov.au/docs/codes/cprac.pdf>>
- New South Wales, Construction Policy Steering Committee, July 1996, *Code of Tendering for the Construction Industry*,
<<http://www.construction.nsw.gov.au/docs/codes/ctend.pdf>>
- Queensland Government, August 2000, *Queensland Code of Practice for the Building and Construction Industry*, <<http://www.ir.qld.gov.au/publications/b&ccodeofpractice.pdf>>

Royal Commission into the Building and Construction Industry, Commonwealth of Australia,
August 2002, *Codes of Practice for the Building and Construction Industry*,
Discussion Paper Eight,
<[http://www.royalcombcgi.gov.au/docs/Complete%20discussion%20paper%208%20v
ersion%202.pdf](http://www.royalcombcgi.gov.au/docs/Complete%20discussion%20paper%208%20version%202.pdf)>

The Procurement Reference Group, May 2003, *The Northern Territory Procurement Code*
<<http://www.nt.gov.au/ntt/procurement/pdf/proccode.pdf>>