



New South Wales Industrial Relations Guidelines: Building and Construction Procurement

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Contents

- 1. Introduction and objectives..... 1
- 2. Definitions..... 2
- 3. Application and scope 3
 - 3.1 Application.....3
 - 3.2 Contract documents and project management procedures3
 - 3.3 Scope4
 - 3.4 Relationship with the Building Code 2016.....5
 - 3.5 Relationship with Fair Work Act 2009 and the Building and Construction Industry (Improving Productivity) Act 20165
- 4. Legal and related obligations 6
 - 4.1 Legal obligations relating to employment.....6
 - 4.2 Practices designed to avoid compliance with legal obligations.....6
 - 4.3 Unregistered written agreements6
 - 4.4 Independent contractors.....7
- 5. Workplace arrangements and over-award payments 8
- 6. Cost, efficiency and productivity 10
 - 6.1 Obligations in Expressions of Interest or tender response 10
 - 6.2 Contractor requirements..... 12
- 7. Project agreements 13
- 8. Dispute settlement, industrial action and strike pay 14
- 9. Workplace safety 16
- 10. Freedom of association and right of entry 19
- 11. New South Wales Government oversight and administration of these Guidelines..... 21
 - 11.1 Responsibilities 21
 - 11.2 Breaches 21
 - 11.3 Sanctions..... 23

1. Introduction and objectives

REISSUE

These Guidelines have been reissued to reflect the reorganisation of New South Wales Government procurement policies generally and recent changes to the Commonwealth legislative framework. This reissue removes references to the redundant New South Wales Code of Practice for Procurement and the National Code. Parties to public building and construction work (as defined) should note that there are no substantive changes from the requirements prescribed by the preceding issue.

INTRODUCTION AND OBJECTIVES

The Guidelines have been developed to implement the New South Wales Government's commitment to greater flexibility and productivity within the State's building and construction industry and to ensure that the New South Wales Government maximises value for money on its spending on infrastructure projects.

In particular, these Guidelines are directed to supporting the following outcomes:

- **Compliance**
Compliance with the law, without exception.
- **Productivity**
Projects should be delivered on time and within budget.
- **Safety**
Parties should achieve and maintain high standards in occupational health and safety.
- **Freedom of association**
Parties must recognise the right of individuals to be or not be involved in lawful industrial activity and to be free from harassment in relation to workplace relations matters.

Commonwealth Building Codes

The New South Wales Government acknowledges that parties to building and construction work may be legally bound by the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), the Commonwealth's *Code for the Tendering and Performance of Building Work 2016* and predecessor Codes along with the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth).

Nothing in these Guidelines should be construed so as to require a party or potential party to New South Wales Government funded building and construction work to breach any requirement of those laws.

2. Definitions

The following are explanations of terms used in these Guidelines:

- a) **Building and construction work** includes:
 - all organised activities concerned with demolition, building, landscaping, civil engineering, process engineering, mining and heavy engineering; and
 - building refurbishment or fit out, installation of building security systems, fire protection systems, air conditioning systems, computer and communication cabling, building and construction of landscapes;**but excludes**
 - mining operations, maintenance, landscaping such as lawn mowing, pruning and other horticultural activities and cleaning buildings.
- b) **Client** means any project owner, project manager, or initiator, inviting or receiving proposals or tenders and in relation to public building and construction work means the client agency.
- c) **Client agency** means the New South Wales Government department or public sector body (as defined in the *Government Sector Employment Act 2013*) that enters into a contract for building and construction work with the principal contractor.
- d) **Construction Compliance Unit** means the unit established to monitor compliance with and receive reports of alleged breaches of these Guidelines.
- e) **Consultant** means a person who provides specialist advice and/or professional service.
- f) **Contractor** means a person who provides building and construction work and services, and includes a principal contractor and a subcontractor.
- g) **JSA** means Job Safety Assessment.
- h) **On-site** includes the primary construction site(s) or any auxiliary or holding sites, where building and construction related work is performed.
- i) **Over-award payment** means any payment and/or benefit above that set out in the relevant award, registered agreement and/or legislation and includes payments provided for in workplace arrangements.
- j) **Party** includes, but is not limited to, clients, contractors, subcontractors, suppliers, consultants, employees, unions – their officials, employees and members and industry associations while undertaking a representative role.
- k) **Principal contractor** means the party with whom the client agency enters into a contract for building and construction work.
- l) **Privately funded building and construction work** means building and construction work in New South Wales that is not public building and construction work.
- m) **Public building and construction means building** and construction work undertaken by, or on behalf of a client agency.
- n) **Responsible Minister** means, in relation to a client agency, the Minister responsible for the portfolio within which the client is located.
- o) **SWMS** means Safe Work Method Statement.
- p) **Tender** means an offer in writing, which includes price, in response to an invitation to execute work or supply goods.
- q) **Tenderer** means any party responding to an expression of interest or submitting a tender for public building and construction work, including principal contractors, contractors, subcontractors and suppliers.
- r) **WHS** means work health and safety, and return to work.

3. Application and scope

3.1 Application

These Guidelines apply to all public building and construction work (as defined) that is the subject of an expression of interest or request for tender on or after 1 July 2013.

Any relevant document or procedure referencing the *Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction* - means a reference to these reissued Guidelines. Relevant documents may include but not are limited to: a Practice Direction, a workplace relations management plan or a model contract clause.

3.2 Contract documents and project management procedures

Clients and principal contractors are responsible for ensuring the application of, and compliance with, these Guidelines through:

- ensuring that compliance with these Guidelines is included as an integral component of their contract management procedures; and
- all expressions of interest, tender and contractual documents clearly setting out the requirements specified in these Guidelines.

While the form of wording will vary according to the contract form and the type of service supplied, the relevant contractual documents must incorporate the requirement for the contractor, consultant and/or related entities (as applicable) to comply with all aspects of these Guidelines. This includes but is not limited to allowing authorised personnel to:

- inspect any work, material, machinery, appliance, article or facility;
- inspect and copy any record relevant to the project; or
- interview any person,

as is necessary to demonstrate compliance with these Guidelines.

Principal contractors will be required to ensure that their contractors allow New South Wales Government authorised personnel to monitor and investigate compliance as above through relevant contractual documents.

The relevant contractual documents must allow New South Wales Government authorised personnel to access sites, documents and personnel to monitor and investigate compliance with these Guidelines.

Contractors and consultants undertaking work covered by these Guidelines must notify the Construction Compliance Unit (or nominee) and the client of any alleged breaches of these Guidelines and of voluntary remedial action taken within 24 hours of becoming aware of the alleged breach.

Model contract clauses are available at www.industrialrelations.nsw.gov.au. These model clauses may be updated from time to time to reflect changes in New South Wales Government contractual practice.

3.3 Scope

- a) A party interested in performing public building and construction work must comply with these Guidelines from the date that party first expresses interest in, tenders for, or enters into a contract to perform public building and construction work to which these Guidelines apply.
- b) A party will also be required to comply with these Guidelines (except where their application is expressly excluded) when undertaking privately funded building and construction work where expressions of interest or tenders were called for after the date in 3.1 above.
- c) These Guidelines apply solely to parties who participate in on-site activities.
- d) These Guidelines also apply to public private partnerships (PPPs), alliance contracts, design and construct (D&C) procurement method and any other project funding arrangements initiated by a client agency or any other procurement method that may be introduced from time to time to reflect changes in New South Wales Government contractual practice.
- e) A party must require and actively ensure compliance with these Guidelines by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work.
- f) The client may seek to waive elements of these Guidelines but only in exceptional circumstances where it is considered in the public interest do so. The client must fully document the reasons for seeking the waiver and submit them to the Responsible Minister. Following a request from the Responsible Minister, the Treasurer and Minister for Industrial Relations may approve or not approve the waiver.
- g) Related entities of any party that first expresses interest for, tenders for, or enters into a contract to perform public building and construction work are also required to comply with these Guidelines in respect of any building and construction work they undertake.

An entity is a related entity of a tenderer if it is engaged in building and construction work and:

- the entity is connected with the tenderer as defined below; or
- it is a body corporate which is related to the tenderer as defined below.

Connected means the entity:

- i. can control, or materially influence, the tenderer's activities or internal affairs; or
- ii. has the capacity to determine or materially influence the outcome of the tenderer's financial and operating policies; or
- iii. is a member of the tenderer; or
- iv. is financially interested in the tenderer's success or failure or apparent success or failure.

Related means the body corporate—within the meanings in the *Corporations Act 2001* (Cth):

- i. is a holding company of the tenderer; or
- ii. is a subsidiary of the tenderer; or
- iii. is a subsidiary of a holding company of the tenderer; or
- iv. has one or more directors who are also directors of the tenderer; or
- v. without limiting the above, controls the tenderer.

3.4 Relationship with the Building Code 2016

These Guidelines apply in addition to any Building Code or Implementation Guidelines issued by the Commonwealth Government that may apply whilst these Guidelines are in effect.

No provisions of these Guidelines will cease to apply as a result of any inconsistent provisions in any Building Code or Implementation Guidelines issued by the Commonwealth Government.

3.5 Relationship with Fair Work Act 2009 and the Building and Construction Industry (Improving Productivity) Act 2016

- a) These Guidelines do not require, encourage or promote conduct that would constitute a contravention of the *Fair Work Act 2009* (Cth) or the *Building and Construction Industry (Improving Productivity) Act 2016*.
- b) To the extent that any provision of these Guidelines, or a party's compliance with any provision of these Guidelines, would, but for this Section 3.5, require, encourage or promote conduct that would constitute a contravention of the *Fair Work Act 2009* (Cth) or the *Building and Construction Industry (Improving Productivity) Act 2016*, that provision is of no effect.
- c) Subject to paragraph (f) below, if any party that is required to comply with these Guidelines considers that a provision of these Guidelines would, but for this Section 3.5,
 - i. require, encourage or promote conduct by them or any of their contractors, or
 - ii. apply to or in relation to them or any of their contractors in a manner, that would constitute or give rise to a contravention of the *Fair Work Act 2009* (Cth) or the *Building and Construction Industry (Improving Productivity) Act 2016*, that party must within 7 days give notice to the CCU of the reasons why and circumstances in which that party considers the provision would so require or apply, and must thereafter provide the CCU with any further details of the reasons and circumstances that the CCU may reasonably require.
- d) Without limiting the generality of paragraphs (a) and (b) above, if the CCU considers at any time that a provision of these Guidelines would or may, but for this Section 3.5, require, encourage or promote conduct that would constitute a contravention of the *Fair Work Act 2009* (Cth) or the *Building and Construction Industry (Improving Productivity) Act 2016*, the CCU may issue (and may modify or withdraw from time to time) a Practice Direction declaring the extent to which and the circumstances in which the relevant provision is inoperative while the Practice Direction is in force, and the relevant provision is inoperative and is to be disregarded accordingly.
- e) For the avoidance of doubt, if a party acts in reliance on a Practice Direction issued by the CCU, conduct undertaken in such reliance does not constitute non-compliance with the Guidelines.
- f) Parties are not required to notify the CCU under paragraph (c) in relation to provisions of the Guidelines where the CCU has issued a Practice Direction specifying that the provision is inoperative in the relevant circumstances.

4. Legal and related obligations

4.1 Legal obligations relating to employment

As a minimum, a party must comply, and demonstrate past compliance required by these Guidelines, with all applicable:

- legislation;
- court and tribunal orders, directions and decisions; and
- industrial instruments.

An industrial instrument is an award or agreement, however designated, that:

- is made under or recognised by an industrial law; and
- concerns the relationship between an employer and the employer's employees.

Where a party cannot demonstrate past compliance required by these Guidelines, consideration will be given to the extent of non-compliance and the capacity for future compliance.

4.2 Practices designed to avoid compliance with legal obligations

A party must not enter into, participate in, or facilitate arrangements or practices designed to avoid its own legal obligations, or the legal obligations of others. Without limiting the foregoing, this includes arrangements or practices:

- that are sham contracting arrangements;
- that are designed to avoid or circumvent strike pay obligations;
- that are designed to avoid or circumvent strict compliance with their right of entry requirements in accordance with applicable legislation, court and tribunal orders, and industrial instruments; or
- that undermine freedom of association.

When undertaking building and construction work, contractors must implement on-site practices and procedures which:

- promote compliance with the objectives of these Guidelines;
- encourage best-practice, cost efficiency and productivity; and
- promote productive and safe work practices.
- promote innovation and continuous improvement.

4.3 Unregistered written agreements

A party must not enter into an unregistered written agreement.

An unregistered written agreement is an individual or collective agreement that has not been certified, registered, lodged or otherwise approved under an industrial law, but is concerned with the relationship between an employer and its employees and/or registered or unregistered industrial associations. However, it does not include common law agreements made between an employer and an individual employee.

4.4 Independent contractors

Genuine independent contractors undertake a legitimate form of work on New South Wales Government building and construction sites and must not be discriminated against. Subject to applicable legislation, arrangements that constrain or otherwise restrict the use of independent contractors and the terms of their engagement are inconsistent with these Guidelines.

This includes terms of an enterprise agreement that (in effect) requires a contractor to ensure where it engages subcontractors in classifications of workers that are not usually employed by the contractor, that these subcontractors and their employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they are engaged as employees of the head contractor.

5. Workplace arrangements and over-award payments

The Guidelines require:

- 5.1 Parties are prohibited from applying direct or indirect coercion or pressure on another party to make over-award payments. Further, no contractor or consultant is allowed to unduly influence, enter into any agreement, or issue a contract, subcontract or industrial instruction that directly or indirectly binds or otherwise pressures or coerces another party into making over-award payments.
- 5.2 Payments to industry superannuation, redundancy and sick leave funds which provide for contributions in excess of award and legislative requirements are matters to be decided by each employer. Provisions in industrial instruments or contracts should not require, or have the effect of coercing or pressuring, a group apprenticeship scheme or similar provider to set particular terms and conditions, including the making of an over-award payment.
- 5.3 Parties are prohibited from requiring or attempting to unduly influence another party to have particular workplace arrangements in place. This includes, but is not limited to, the imposition, or attempted imposition, of a requirement for a contractor to apply project-specific wages and conditions. It is the responsibility of a contractor to negotiate with its employees the form and content of their workplace arrangements free of any coercion or undue influence.
- 5.4 Parties shall not negotiate or implement arrangements or agreements that restrict the efficient performance of work or contain provisions that restrict productivity improvement. Without limiting the foregoing, industrial instruments that contain the following kinds of provisions will be non-compliant with these Guidelines, if the provision is not otherwise required by a relevant Commonwealth or state law:
 - no ratios of employees. An industrial instrument, or workplace practices, must not prescribe the number of employees a company may engage on a particular site or work area, or within their company in general. This includes permanent, temporary and casual employees;
 - no one-in-all-in arrangements. An industrial instrument, or workplace practices, must not allow for situations where one-in-all-in practices occur, such as in relation to overtime;
 - no last on, first off clauses. An industrial instrument must not contain selection criteria for redundancy that ignore the employer's operational requirements, such as last on, first off clauses. Similarly, an industrial instrument should not contain clauses that determine redundancy solely by reference to the seniority of employees;
 - no restrictions on labour. An industrial instrument must not contain a provision that restricts an employer's short or long-term labour requirements, nor provisions that stipulate the terms and conditions for the labour of any person not a party to the industrial instrument. Accordingly, an industrial instrument must not include provisions that require an employer to consult or seek the approval of a union over the number, source, type (for example casual, contract) or payment of labour required by the employer; and

- no prohibiting of all-in payments. An industrial instrument must not preclude the employer from making all-in payments. For this purpose, all-in payments mean 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 entitlement specifically provided for by legislation or awards, such as annual leave loading or overtime. A payment to a subcontractor is not an all-in payment for the purpose of this definition. All-in payments are not to include statutory obligations, such as superannuation contributions. Arrangements where the intended outcome is to avoid employer/ employee obligations are illegal and inconsistent with these Guidelines;
 - no relaxation of the right of entry provisions for officials of industrial organisations. An industrial instrument must not seek to relax or circumvent the legislative provisions or processes in relation to the right of entry of officials of industrial organisations and/or provide for a person or entity that is not a party to the instrument to monitor its operation¹ (See also section 10).
- 5.5 Clauses that attempt to negate or render ineffective the application of these Guidelines are inconsistent with these Guidelines. Such clauses may include wording such as: 'nothing shall be contrary to law...', 'clauses that are inconsistent with Commonwealth law...' and 'clauses that are inconsistent with these Guidelines will have no effect...' (or similar wording). This also includes attempts to render clauses in agreements ineffective that may otherwise have been inconsistent with legislative requirements and/or these Guidelines;
- 5.6 An industrial instrument must not make provision for project agreements to apply in whole or in part, other than for major contracts as defined by the client. (See Section 7 for further details on project agreements.)
- 5.7 If an industrial instrument provides for a site allowance (that is an allowable award matter), the amount must be specified in an industrial instrument certified or approved under the *Fair Work Act 2009* or otherwise approved under relevant state legislation, or in a project agreement or project award.

6. Cost, efficiency and productivity

6.1 Obligations in Expressions of Interest or tender response

A tenderer must, as part of any expression of interest or tender response, provide a Workplace Relations Management Plan (WRMP) where the New South Wales Government department or public sector body contribution (directly or indirectly) to a project is \$10 million or more or is at least \$5 million and represents at least 50 per cent of the total construction project value.

A tenderer must, where required under this clause:

- a) Submit a Workplace Relations Management Plan (WRMP) for the project aimed at meeting the objectives of these Guidelines that addresses the following:
 - labour requirements (e.g. skills, numbers required, manner of supply, recruitment, engagement, termination, redundancy of labour to allow for changing demands across the life of the project);
 - how workplace arrangements will be regulated;
 - engagement of the required labour including, but not limited to, mobilisation plans and selection procedures (e.g. reference checks and inductions);
 - approach to developing and maintaining a productive workforce, ensuring the optimal use of labour requirements (e.g. approach to managing inclement weather and heat, RDOs);
 - there are no genuine local government planning reasons why ordinary working days adjacent to long weekends should not be worked;
 - sourcing, selection and training of suitably experienced construction supervisors;
 - approach to relationship management with employees, employee representatives and/or unions including, but not limited to, the approach and process for communicating and consulting with the workforce;
 - approach to the use and engagement of labour hire;
 - approach to managing third party site access;
 - approach to ensuring compliance with statutory workplace rights including, but not limited to, freedom of association, freedom from unlawful coercion and freedom from unlawful discrimination;
 - approach to performance and conduct management of labour (e.g. disciplinary process to be applied);
 - identification of industrial relations risks in relation to the project and details as to the proposed approach to managing those risks, including but not limited to, the following:
 - approach to dispute resolution;
 - approach to dealing with demarcation disputes;
 - response to industrial action (both threatened and actual, protected and unprotected) including in respect of subcontractors;
 - approach to management of disputes in relation to rights of entry; and
 - approach to minimising lost time or limitations due to industrial disputes.

- approach to the management of subcontractors, outlining:
 - the measures to be taken to select subcontractors who have the skills, capacity and resources to comply with legislative requirements, employment obligations and the WRMP (to the extent relevant);
 - conditions to be imposed on subcontractors to ensure they comply with legislative requirements, employment obligations and the WRMP (to the extent relevant);
 - how dealings with subcontractors and other contractors are to be managed including, but not limited to, identification of representatives and methods for engaging with those representatives; and
 - how subcontractor compliance with the workplace relations requirements will be monitored.
- b) Explain the systems, processes and procedures it has in place (or will implement) to:
- achieve the objectives of these Guidelines on the project; and
 - deliver the project on time and within budget.
- (This may be done as part of the WRMP.)
- c) Be able to demonstrate how it will:
- achieve the objectives of these Guidelines on the project; and
 - deliver the project on time and within budget.
- For example, a tenderer must be able to demonstrate how the objectives of these Guidelines relating to costs and improved efficiency and productivity can be met in the context of any of the following (if applicable to the tenderer):
- restrictions on when work can be performed, such as mandated or fixed rostered day off schedules and one-in-all-in arrangements;
 - the potential for unexpected costs or increased costs during the life of a project, such as site allowances which are not quantifiable at the time of contracting;
 - adoption of terms and conditions common to a project or an industry and which are not specific to, or reflect, the needs of the enterprise; and
 - impositions or restrictions on the engagement and/or utilisation of labour.
- d) Demonstrate that it has a track record of delivering construction projects on time and within budget. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such objectives in the future.
- For example, where a tenderer has failed to deliver construction projects on time and within budget in the past as a result of industrial relations matters, that tenderer must be able to identify:
- the reasons for the failure; and
 - the steps it has taken to address those matters for future projects.
- e) Demonstrate that it has a track record of adopting efficient and productive work practices. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such objectives in the future.
- f) Set out its view on whether a project agreement might be appropriate for the project, including by reference to any past projects where the tenderer has been a party to such an agreement.

6.2 Contractor requirements

A successful contractor must:

- a) Comply with its WRMP.
- b) Act in accordance with its tender response.
- c) Require compliance with these matters set out above by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work, to the extent applicable to that party.
- d) Comply with any reasonable request for access and information from the Construction Compliance Unit.
- e) Submit to and cooperate with any investigation process by the Construction Compliance Unit on any matters pertaining to compliance with these Guidelines.

7. Project agreements

- 7.1 Project agreements on public building and construction projects will only be appropriate for major contracts as defined by the client. Other than in exceptional cases, project agreements will not be permitted on projects worth less than \$100 million. Clients are free not to agree to the creation of project agreements.
- 7.2 In relation to public building and construction work, the client must not agree to project agreements or project awards unless there is a clear and demonstrable benefit to the New South Wales Government in doing so and the use of a project agreement is approved in advance by the Treasurer and Minister for Industrial Relations in consultation with the responsible Minister. In deciding whether to seek approval for the use of a project agreement, the following must be considered:
- the degree of commitment demonstrated by the parties to the proposed agreement to improving productivity and workplace relations;
 - the form of improved time or cost performance compared to what might reasonably be expected in the absence of a project agreement; and
 - past performance and the parties' history of maintaining and abiding by agreements.
- 7.3 The client is accountable for decisions to seek approval of a project agreement and must state their reasons for seeking approval for such an agreement in writing to the Treasurer and Minister for Industrial Relations (and copied to the responsible Minister). The reasons must include objective and detailed grounds and clearly demonstrate the benefit to the project. Approval of a project agreement rests with the Treasurer and Minister for Industrial Relations.
- 7.4 Subcontractors will be involved in the process of developing a project agreement before it is finalised.
- 7.5 A project agreement must be made under the *Fair Work Act 2009* (Cth).

8. Dispute settlement, industrial action and strike pay

The Guidelines require:

Dispute settlement

- 8.1 Grievances or matters under dispute are to be dealt with at the workplace between the appropriate level of management, employees and where applicable, union representatives.
- 8.2 Agreements should contain arrangements providing graduated steps for discussion of disputes involving higher levels of authority to which the matter in dispute can be referred if it cannot be resolved.
- 8.3 Reasonable time limits should be allowed for each stage of relevant dispute settlement processes. While dispute settlement procedures are being followed the parties are to ensure that:
 - industrial action does not occur;
 - the circumstances that existed prior to the dispute prevail; and
 - work continues as normal without detriment to any of the parties.
- 8.4 Dispute settlement provisions must allow an employee to have freedom of choice in deciding whether to be represented, and, if so, by whom. Accordingly, dispute settlement provisions must allow for an employee to raise an issue either directly with their employer or through a representative of their choice.
- 8.5 An enterprise agreement may contain its own dispute settlement process that gives a third party the ability to arbitrate or otherwise impose an outcome to settle the dispute. In such cases, the clause must contain an express limitation that any outcome determined by the third party cannot be inconsistent with these Guidelines or inconsistent with legislative obligations.
- 8.6 Where a dispute relates to WHS issues, the procedures contained in the relevant New South Wales WHS legislation should be observed. Parties must make take all reasonable steps to resolve grievances or disputes at the enterprise level at the earliest opportunity, in accordance with the procedures outlined in the relevant industrial instrument or other workplace arrangement.
- 8.7 The principal contractor must report any grievance or dispute relating to workplace relations or WHS matters that may impact on project costs, related contracts or timelines to the Construction Compliance Unit (or nominee) and the client within 24 hours of it becoming aware of the grievance or dispute. The principal contractor must provide regular updates to the Construction Compliance Unit (or nominee) and the client about the steps being taken to resolve such grievances or disputes.
- 8.8 The principal contractor must implement procedures to enable such reporting to occur at the earliest opportunity. All lost time information as a consequence of lawful and unlawful industrial conduct must be accurately recorded and provided to the Construction Compliance Unit and client agency on a timely basis.

Industrial action

- 8.9 Parties must take all reasonable steps to resolve industrial action which adversely affects, or has the potential to adversely affect, the delivery of a project or other related contracts on time and within budget.
- 8.10 Contractors must report any threatened or actual industrial action that may impact the project, project costs, related contracts or timelines to the Construction Compliance Unit (or nominee) and the client agency within 24 hours of the threatened or actual industrial action. The contractor must provide regular updates to the Construction Compliance Unit (or nominee) and the client agency about the steps being taken to resolve the threatened or actual industrial action.
- 8.11 Contractors must take all steps reasonably available to them to prevent or bring to an end unprotected industrial action occurring on, or affecting, the project, including by pursuing legal action where possible. Contractors will be required to use their best endeavours to pursue legal remedies to protect their rights and obligations under the Guidelines. A failure to instigate appropriate legal remedies may be considered to be a breach of the Guidelines.

9. Workplace safety

The Guidelines require:

9.1 Achievement of the objectives of these Guidelines

A tenderer must be able to demonstrate how they will be able to achieve the objectives of these Guidelines in relation to safety, including encouragement of best practice and promotion of the highest standards in the industry and application of relevant WHS legislation, regulations and codes.

9.2 Commitment of senior management to safety

A tenderer must be able to demonstrate that its senior managers are proactively involved in, and committed to, achieving safety objectives and improving safety outcomes on the project.

Such commitment may be demonstrated by:

- Recognition under the NSW Government's prequalification system;
- the tenderer's WHS policy;
- reference to the WHS obligations of senior management in the tenderer's WHS management plan;
- governance structures and reporting requirements that enable senior management to understand and respond to WHS issues on the project; and
- involvement of senior management in the project (including attendance, from time to time, on the project site and during project safety meetings).

9.3 Effective risk management

A tenderer must submit a Work Health Safety Management Plan (WHSMP) or Site Specific Safety Management Plan (SSSMP) aimed at meeting the objectives of these Guidelines that addresses the following, at a minimum:

- processes for reviewing, updating and communicating the HSMP;
- provision of adequate WHS and rehabilitation resources during the project, including human resources, financial resources and technical resources;
- details of the organisational structure as it relates to safety, including identification of key WHS personnel, key WHS responsibilities and accountabilities and key WHS reporting lines;
- detailed risk management processes that can be applied to both the design and construction phases of the project;
- processes for the preparation and communication of task specific safety procedures (e.g. JSAs and SWMSs), including sample procedures for addressing common construction hazards and risks (e.g. work at heights);
- processes for ensuring all persons working on the project receive necessary information and training, including general induction training, site induction training and task-specific training;
- reporting and investigation of incidents resulting in (or with the potential to result in) personal injury and property damage;
- reporting and responding to regulatory action;
- strict adherence to lawful right of entry provisions;
- emergency response and incident management processes, including identification of personnel with specific responsibilities and proposed engagement with emergency services prior to and during the project;

- monitoring and auditing processes for the project, including frequency, responsible personnel and proposed response to non-conformance or non-compliance identified;
- appropriate systems for case management and rehabilitation of injured workers;
- appropriate record-keeping and document management systems; and
- appropriate WHS and rehabilitation performance monitoring and reporting.

A tenderer must demonstrate that it has a track record of delivering construction projects safely. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such a track record in the future.

For example, where a tenderer has failed to deliver construction projects safely in the past, that tenderer must be able to identify:

- the reasons for the failure; and
- the steps it has taken to address those matters for future projects.

9.4 Consultation and issue resolution

A tenderer must demonstrate how it intends to engage with other parties about safety on the project and resolve safety issues that arise in order to achieve the objectives of these Guidelines, including encouragement of best practice, promotion of the highest standards as well as the delivery of the project on time and within budget.

A tenderer must have a process for each of the following:

- **Consultation with workers and employee representatives**, which addresses: determination of designated work groups, election/training of health and safety representatives, establishment of health and safety committees, agreement on specific roles/rights for HSRs and committee members, establishment of WHS right of entry protocols and the procedural requirements for consultation (e.g. how consultation is to occur – in person, via email, through HSRs);
- **Consultation, cooperation and coordination with other stakeholders**, which addresses: transfer of knowledge and information both before and during the project, allocation of WHS roles and responsibilities, collaboration about risk management and emergency response and communication/reporting protocols. Relevant stakeholders may include (depending on the project) other contractors/consultants, residents or occupiers near the project site; utility/asset owners and emergency services;
- **WHS issue/dispute resolution**, which addresses: reporting of WHS issues to the tenderer, roles and responsibilities for responding to issues reported, consultation requirements, protocols for involving third parties (including regulators, employee representatives, other stakeholders, independent bodies/experts, etc) and timelines for resolution/escalation; and
- **Engagement with regulatory authorities**, which addresses: proactive engagement and relationship building with relevant regulators; consultation with regulators regarding safety issues and best practice, provision of information regarding the project to regulators and responding to the exercise of regulatory powers and/or enforcement action.

9.5 Project learnings and initiatives

A tenderer must demonstrate how it intends to improve WHS outcomes (both on the project and in the industry more generally) to achieve the objectives of these Guidelines, in particular encouragement of best practice and improvement of the performance of all participants in the industry.

In responding, a tenderer should address the following, at a minimum:

- process for sharing learnings from the project, which may include development of a safety alert publication to be produced following major incidents or key safety milestones and then distributed across the industry;
- process for monitoring, measuring and communicating key performance indicators for safety, which may include development of a monthly report containing lead and lag indicators to be provided to the client;
- process for transferring knowledge and analysing performance at the end of the project, which may include development of a completion report detailing WHS performance across the project, key safety initiatives and learnings and areas for improvement on future projects; and
- process for engaging with third parties to achieve improvements in safety, which may include appointment of an independent auditor for the project and engagement with industry bodies or experts to address WHS issues that arise.

10. Freedom of association and right of entry

The Guidelines require:

10.1 Contractors must adopt policies that promote freedom of association.

10.2 Practices which do not promote freedom of association are inconsistent with these Guidelines. By way of example, the following practices are inconsistent with these Guidelines:

- providing the names of new staff, job applicants, contractors or subcontractors to unions other than as required by law;
- no ticket, no start signs, show card days or any other similar practices that imply that union membership is anything other than a matter for individual choice;
- employers unlawfully encouraging or discouraging employees to join a union;
- using employee representatives, site delegates or other union representatives to undertake or administer site induction processes. This process should be undertaken by site management. Where there is a requirement in any existing enterprise agreement made before the application date of these Guidelines for employee representatives, site delegates or other union representatives to undertake or administer site induction processes, then any such process must be overseen by, or also involve, site management;
- discriminating against or disadvantaging elected employee representatives;
- using forms requiring the employee to identify their union status, or requiring employers and contractors to identify the union status of employees or subcontractors;
- refusing to employ, or terminating an employee, because of their union status;
- employers refusing a reasonable request from a workplace delegate to represent employees in relation to grievances and disputes or discussions with members;
- the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate or to hire an individual nominated by a union;
- a requirement for an employer to apply union or any other logos, mottos or other indicia to company supplied property or equipment, including clothing, unless there is a requirement to do so in any existing enterprise agreement made before the application date of these Guidelines; and
- any requirement that a person pay a bargaining fee, however described, to an industrial association of which he/she is not a member, in respect of services provided by it.

- 10.3 No employer or employee is to grant admission to a site by an employee or official of an industrial association other than in strict compliance with the procedures governing entry of such representatives under the *Fair Work Act 2009* and any relevant and applicable WHS or NSW legislation. These procedures govern access to employer and employee records and/or the holding of discussions with employees.
- 10.4 Attempts to avoid right of entry requirements for union officials by allowing delegates or shop stewards to perform a similar function are inconsistent with these Guidelines.
- 10.5 An industrial instrument must not provide for a person or entity that is not a party to the instrument to monitor its operation. Monitoring for this purpose does not include activity required or permitted under Commonwealth or State law, or monitoring by a New South Wales Government or Commonwealth Government agency to ensure compliance with these Guidelines.

11. New South Wales Government oversight and administration of these Guidelines

Monitoring and sanctions

11.1 Responsibilities

The Treasurer and Minister for Industrial Relations has overall responsibility for the implementation of these Guidelines.

Client agencies are primarily responsible for ensuring the application of, and compliance with, the NSW Guidelines by:

- ensuring that compliance with the Guidelines is included as an integral component of their contract management procedures (including by way of model contract clauses); and
- requiring that all expressions of interest, tender and contractual documents clearly set out the requirements specified in the Guidelines.

Principal contractors will be contractually obliged to implement the requirements of the Guidelines.

The Construction Compliance Unit in NSW Industrial Relations is responsible for monitoring compliance with these guidelines and to receive reports of alleged breaches. Where the outcome of investigations reveals serious or repeated breaches of these Guidelines, the Construction Compliance Unit will report the outcome to the client agency for the consideration of appropriate sanctions.

11.2 Breaches

Client agencies must report all breaches and any sanctions imposed to the Construction Compliance Unit, which may conduct an investigation. Serious or repeated breaches must be reported to the Treasurer and Minister for Industrial Relations for consideration of the ultimate sanction of preclusion from future tendering opportunities. The Treasurer and Minister for Industrial Relations may also publicise the breach and the identity of the party.

The Construction Compliance Unit can investigate and report on any alleged breaches. Its report will be delivered to the client agency and the Treasurer and Minister for Industrial Relations. The Construction Compliance Unit may recommend sanctions, but the decision to apply a sanction is a matter for the client agency in the first instance and ultimately, in the case of serious or repeated breaches, the Treasurer and Minister for Industrial Relations.

Reportable conduct may also involve illegal or corrupt practices that can only be investigated and dealt with by an agency with relevant powers, such as Fair Work Building and Construction (Commonwealth), NSW Police and WorkCover NSW. For example, an employer that fails to prevent or bring to an end unprotected industrial action by pursuing all legal avenues available may be in breach of the Guidelines and subject to possible contract sanctions by the client agency. That unprotected action however, may have involved breaches of various industrial laws that can only be prosecuted by the Australian Building and Construction Commission.

Where the possibility of such a breach has been identified, the Construction Compliance Unit will refer it to the relevant enforcement agency.

The Construction Compliance Unit may also conduct audit activity of its own initiative.

11.2.1 Monitoring and reporting

The Construction Compliance Unit will undertake monitoring and compliance work including assessment of industrial instruments and where necessary, site visits, site inspections and audits.

The Construction Compliance Unit will provide feedback and report to the client agency and Treasurer and Minister for Industrial Relations as appropriate, including where alleged breaches of these Guidelines are identified.

The Construction Compliance Unit will also respond to reports of alleged breaches of these Guidelines. Such reports must include:

- details of the circumstances and extent of the alleged breach or breaches; and
- a copy of any written information or advice exchanged in relation to the matter.

The CCU on receiving a report of an alleged breach must notify the party alleged to have breached these Guidelines of the report. The Construction Compliance Unit may provide information or documents at its discretion to the party alleged to have breached these Guidelines. The Construction Compliance Unit must give the party alleged to have breached these Guidelines an opportunity to make submissions to the Unit. Parties reporting alleged breaches must be informed of the investigations made and any action taken.

Where the matter involves an alleged breach of Commonwealth or State legislation, the Construction Compliance Unit may refer it to the appropriate statutory body.

The Construction Compliance Unit's approved nominee may, or will if requested by a party, liaise with the relevant industry association representing the party alleged to have breached these Guidelines.

The Construction Compliance Unit will report all proven breaches to the Treasurer and Minister for Industrial Relations.

In connection with an investigation or a review, the Construction Compliance Unit has absolute discretion as to which, if any, information or documents should be provided to any person.

11.2.2 Review of a decision made under these Guidelines

Any person aggrieved by any action or decision made under these Guidelines in relation to alleged non-compliance with these Guidelines may request a review of that action or decision by writing to the Secretary of the Treasury within 14 days of the date of the letter advising of the action or decision.

The review is to be conducted in an informal manner, usually without a hearing and taking into account those matters considered during the process in light of the matters raised in the letter requesting the review. It is intended that there will be no delay to a project as a result of the review.

The review will be conducted by a person appointed by the Secretary who, in the Secretary's opinion, has relevant experience.

The person conducting the review shall provide a written report to the Secretary who, in turn, will respond to the person requesting the review and provide the report to the Treasurer and Minister for Industrial Relations. The report and response must be completed within 14 days of the request for review.

11.2.3 Breaches by agencies and agency employees

Proven breaches by a government agency will also be reported by the Secretary to the responsible Minister.

The Government has made adherence to these Guidelines a key measure of agencies' performance.

Chief Executive Officers are responsible for ensuring their agency's performance.

The avenues already available to individuals in the private sector who wish to raise issues associated with the performance of government agencies, including representations to government Ministers, Members of Parliament and the Ombudsman are unaffected by these Guidelines.

11.2.4 Breaches by others

The Construction Compliance Unit will report proven breaches by other parties to the Treasurer and Minister for Industrial Relations.

11.3 Sanctions

The scope of sanctions imposed for proven breaches of these Guidelines will depend on the nature of the breach.

11.3.1 Sanctions on client agencies and agency employees

On the advice of the Secretary, the Treasurer and Minister for Industrial Relations and the responsible Minister will consider appropriate actions to ensure future compliance with these Guidelines.

Where it is demonstrated that public sector employees have breached these Guidelines, disciplinary action may be taken.

Further breaches will lead to more severe sanctions.

11.3.2 Sanctions on others

In the case of a proven breach by other parties, sanctions may include, but are not limited to:

- a formal warning that a further breach will lead to severe sanctions;
- referral of a complaint to the relevant industry organisation for assessment against its own professional code of conduct and appropriate action;
- reduction in tendering opportunities at either agency or government-wide level, for example, by exclusion of the breaching party from tendering for government work above a certain value or for a specified period (this sanction may only be imposed by the Treasurer and Minister for Industrial Relations in consultation with the responsible Minister);
- reporting of the breach to an appropriate statutory body; and
- publicising the breach and the identity of the party.