

Review of Best Practice Principles

Our response outlines several changes that will strengthen the framework; however, we reiterate that Master Builders, along with the other construction and infrastructure industry groups maintain the view that the Best Practice Principles (BPPs) are unnecessary red tape, adding to the cost of tendering without any benefit to the procurement process. Tenderers are providing information that is already reported elsewhere, which causes unnecessary duplication.

We are particularly concerned with introducing Best Practice Industry Conditions as part of Best Practice Industrial Relations. Best practice industrial relations, by definition, entails identifying and negotiating project specific outcomes, relating to quality, productivity, efficiency, fairness etc. Our concern remains that BPICs will escalate costs particularly in regional areas; undermine the Government's 'Buy Local' policy; and may cause federal code compliance issues for contractors.

Our recommended changes to the BPP framework are in summary:

1. The Industry Reference Group to consider the BPICs proposed for each BPP project.
2. Ensure that multiple projects part of a program of works are not automatically subject to BPPs simply because the combined value of all projects exceeds the \$100 million threshold.
3. BPPs are not applied to existing projects.
4. Details of all BPP projects, including the Ministers' reasons for declared projects, are published biannually and considered by the IRG.
5. Amend the evaluation guidelines so that the tender evaluation panel assesses the contractor's best endeavours process - not how the contractor has delivered the BPICs and the outcome of their best endeavours process.
6. Expand the CBRC approval process for BPICs so that the report on consultation includes the views of the IRG.
7. Amend Appendix 4 so that the example indicators of Best Practice WHS are clear that HSRs and/or WHS committees may not be appointed for all BPP Projects.

Details of these are as follows:

BPPs

Best Practice Industry Conditions (BPICs)

The guidelines set out a process for agencies to develop BPICs for each BPP project, culminating with CBRC approval. We believe the process would be strengthened by requiring the relevant Industry Reference Group to consider the proposed BPICs, noting that the IRG already has a role in setting the weightings for the evaluation criteria (the BPPs and local benefits test).

Scope of BPPs

Projects & program

We are very concerned that projects that fall well under the \$100 million threshold are subject to the BPPs. We are aware of the following tenders over recent years:

- Department of Education - Bundaberg State High School – \$880,000
- Department of Education - Caloundra South State High School - \$40-45m
- Department of Education - Pimpama North State Primary School - \$30-35m
- Department of Education - West End State School Expansion - \$10-15m

We have previously flagged our concerns with the approach of rolling say ten \$10 million school projects as a 'program of works', so that threshold is exceeded and each project is required to comply with the BPPs.

We note that there is a new provision relating to programs which on the face it would allow this to happen. We strongly oppose this approach. Multiple projects should not be automatically considered major projects and subject to BPPs simply because the combined value of all projects exceeds the \$100 million threshold. The reality is that there are separate tenders for each project.

Applying BPPs to existing projects

We strongly oppose BPPs being applied to existing projects. Experience with the Townsville Stadium is that retrospectively applying the Minimum Conditions was a disaster for all parties concerned, given that it relies on subcontractors agreeing to vary their contracts and causes disruption to established industrial arrangements.

Declaration process

Currently there is no visibility of the projects that are subject to the BPPs (those declared in addition to those over \$100 million). We recommend that details of all BPP projects – including the Ministers' reasons for declared projects - be published (say) biannually & tabled at a meeting of the IRG. (Note this would be in addition to the current requirement in the guidelines that agencies must seek the IRG's views on possible declared projects.)

How to apply the BPPs

BPICs – development

As flagged under the BPPs heading, to provide industry oversight we recommend that agencies developing BPICs must seek the views of the relevant IRG.

Table 2 – Developing BPICs – key considerations for contractors

Contractors are required to

- undertake a ‘best endeavours’ process to demonstrate how they have worked with subcontractors to reach agreement on conditions which either meet or are as close as possible to the BPICs; and
- submit evidence of undertaking the best endeavours process as part of tender response.

However, the head contractor is unlikely to have agreed terms with subcontractors prior to submitting their tender. This means the head contractor will be unable to submit any evidence of the outcomes of the ‘best endeavours’ process as part of their tender.

Similarly, subcontractors are required to ‘demonstrate how the BPICs will be addressed in their tender submission to the contractor’ but the agency does not get a copy of any subcontractor tenders as part of the head contractor’s tender.

We do not understand how the agency will assess whether the contractor has delivered the BPICs and the outcome of the contractor’s ‘best endeavours’ process.

At most, the head contractor can submit with their tender an outline of the approach that they intend to take to comply with the ‘best endeavours’ requirement. Nothing more can be submitted given the contractor cannot enter into an agreement with a subcontractor for a project that the contractor has not yet entered into a contract for. **(Note – this issue also arises in the Evaluation section (p.18) and Table 6: Example 1 – non-price evaluation criteria weightings.)**

BPICs – CBRC approval

Following on from the earlier point about developing BPICs, the CBRC approval process should be expanded so that the report on consultation includes the IRG’s views.

Evaluation (p.18 of 33)

The evaluation panel is to consider the contractor’s commitment to apply the BPICs and the ‘best endeavours process’ undertaken & outcome. However, as flagged above, this is unlikely to have occurred prior to tender for all subcontractors. At most, the contractor should only be required to provide information in their tender on their ‘best endeavours’ process – not evidence that they have already carried out that process and evidence of the outcome of the process.

The head contractor will not have a contract for the work at the time of submitting their tender. They will not want to be at risk of making a commitment for work to the subcontractor that they do not yet have the legal right to make.

Definitions

Program

As flagged under Project & programs, we strongly oppose the notion of BPPs automatically applying to a program of works simply because the 'rolled up' value of the package exceeds \$100 million.

Appendix 3 – examples for proposing weightings

Ensure the examples reference the changes recommended previously, that is, the agency must consult with DEPW **and the IRG** as part of developing BPICs.

Table 6 Example 1 - Industrial relations

As noted above, it will be impossible for the contractor to provide evidence of undertaking the best endeavours process as part their tender response - the best the contractor can do is provide information on what they intend to do.

Appendix 4 – example indicators of best practice

BPP WHS

It should be noted that HSRs and/or WHS committees may not be appointed for all BPP projects.