

attempts to exclude or limit liability.

It is also recommended that contracts include adequate provision to provide relief for latent ground conditions, where the conditions encountered justify remedy, through the inclusion of a latent condition clause in the contract. The Guidelines include a recommended clause.

### Competence

The Guidelines recommend that the most effective way of obtaining competent contractors is to pre-select qualified tenderers for particular projects or types of work. It is recommended that, for important projects, only contractors competent to perform that type of work be considered. It is also recommended that the number of tenderers be restricted to 6 to 10.

### Benefits

The benefits of action taken in accordance with the recommendations contained in the Guidelines are:

#### For the contractor:

- Tendering limited to pre-selected competent contractors.
- Full disclosure of geotechnical information, leading to a more informed bid.
- No disclaimers or exclusionary provisions.
- A fair allocation of risk.
- An adequate latent conditions clause.

#### For the principal:

- Reduced likelihood of claims due to full initial disclosure of all geotechnical information.
- Reduced scope for claims on the grounds of negligence or misrepresentation, due to clear distinctions between fact, interpretation and opinion and indications of the relative reliance to be placed on each.
- Qualification of the reports and information presented with a clear statement of the purposes for which they were obtained.
- An adequate latent condition clause.
- Lower price due to the reduced need for tenderers to load prices to cover contingent risks, through the use of scheduled rates for contingent conditions and a latent conditions clause.

From discussions with consultants, there have been instances to date where the Guidelines have been used successfully to convince clients to carry out adequate site investigations, to make full disclosure of the geotechnical information without disclaimers and to include a latent conditions clause in the contract.

## 14. AFFIRMATIVE ACTION AND THE CONSTRUCTION INDUSTRY

Women now make up almost 40% of the Australian workforce, nearly double the proportion of 40 years ago. This proportion is not reflected in the construction industry, largely due, no doubt, to the nature of the work involved in the actual process of construction. In this article, Larry King looks at the obligations of employers under the Affirmative Action (Equal Employment Opportunity for Women) Act 1986.

### 1. Introduction.

The Affirmative Action (Equal Employment Opportunity for Women) Act 1986 required companies with 1,000 or more employees at the commencement of 1987, 500 or more employees at the commencement of 1987 and 100 or more employees from 1 February 1989 to begin an Affirmative Action Program.

This paper:

- sets out a company's minimum obligations.
- suggests guidelines for a standard approach to developing and implementing an Affirmative Action Program.
- describes and analyses the penalties for non compliance.
- examines available employment and education statistics to see if a "minimum industry target" is feasible.

### 2. Keywords.

The key words in the Act are **opportunity** and **merit**.

The central purpose of the Act is to require large employers to promote equal opportunity for women in employment. Nothing in the Act requires an employer to take action incompatible with the principle that employment matters should be dealt with on the basis of merit.

### 3. Statutory Requirements.

Employers will be required to:

- develop and implement an Affirmative Action Program;
- submit two reports each year to the Affirmative Action Agency.

Section 8 of the Act describes the eight steps required to set up an AA program. Simply stated they are:

1. Issue a statement notifying employees that an AA program has been commenced.
2. Confer responsibility for the AA program on a senior manager.
3. Consult with trade unions - when developing and implementing the program.
4. Consult with employees.
5. Collect statistics - including workforce by sex and job classification.
6. Review employment policies/practices to see whether they are discriminatory or whether any patterns of lack of equality of opportunity emerge.
7. Set objectives and make forward estimates ("objective" and "forward estimate" are defined in Section 8(3)).
8. Monitor and evaluate the program.

Sections 13 and 14 describe the reports companies are required to make annually to the Affirmative Action Agency. They are:

- i. a public report, providing statistics and related information on workforce by sex and job classification; and an outline of the processes under taken to develop and implement the program.
- ii. a confidential report, providing a detailed analysis of the processes undertaken to develop and implement the program.

(There is an option to combine i. and ii. as a public report.)

The preceding paragraphs simply describe the actual require-

ments of the Act, i.e. a Company's minimum statutory obligations. However, the Agency has issued a 50 page booklet, Affirmative Action For Women: Guidelines For Implementation In The Private Sector, which suggests a wide range of additional obligations in complying with this loosely-worded legislation. The following paragraphs suggest a minimum standard to adopt in setting up an AA program.

4. Suggested Compliance Standard.

4.1 The Affirmative Action Program.

1. The statement of intent should quote the purpose of the Act and summarise the company's actions or intentions under steps 2-to-8 of its AA program. A simple example (Example 3) is provided at p.10 of the Agency's booklet.
2. The Chief Executive should accept responsibility or nominate a senior colleague and appoint, from existing staff, a (female) Affirmative Action Officer to run the program.
3. Set up an Affirmative Action Committee under the chairpersonship of the AA Officer;
4. comprising both female and male staff members and staff members who are union representatives.
5. For statistical purposes, break up the workforce by sex and standard occupations; managerial, professional, para-professional, clerical, skilled, unskilled. Identify the women within the organisation who are available for promotion. Identify the women unavailable for promotion and the reasons.
6. Assess personnel policies and practices for any bias and ways of promoting equal opportunity, including recruiting, selection, promotion and training procedures.
7. It may not be practical to set standard objectives and forward estimates. Companies should consider adopting appropriate examples from page 45 of the Agency's booklet. Remember, you are not required to set employment targets.
8. Affirmative Action Committee to meet regularly to monitor progress, annually assess achievement of objectives, set new objectives and develop new strategies.

4.2 The Annual Reports.

In an effort to present an industry approach, companies should submit both a public and a confidential report, at least in the early years of the policy. If asked by the Agency to make public any or all the information in confidential report, a company should exercise the right to decline.

5. Penalties.

For failing to submit a report, a company may be named in an annual report by the Agency to the Minister. If the Agency thinks a company report does not comply with the Act, it can request further information. If that information is not provided, the company may be named in the Agency's annual report to the Minister. The Agency's reports will be tabled in the Commonwealth Parliament and would no doubt excite media attention.

6. Employment and Education Statistics.

Of all the major industry sectors, mining, energy and construc-

tion have the lowest rate of female participation in the workforce (construction 13% in 1988). This is not unexpected, in view of the often physical nature of the work done by skilled and unskilled construction workers. The higher male concentration in the blue collar group is confirmed by 1986 Census data from which the following percentages were calculated:

Women in Construction 1986

Managerial	8%
Professional	9%
Para-professional	6%
Trades	2%
Clerical	80%
Skilled*	2%
Unskilled	5%

\*e.g. plant operators.

Time series data of higher education course completions by sex, show a large divergence between the proportion of women completing architecture/building courses (17% 1981 to 22% 1986) and women completing engineering/surveying courses (2% 1981 to 5% 1986). Although the number of women engineering graduates has increased dramatically over the period (from 72 in 1981 to 240 in 1986), the architecture/building courses are still the most popular with women. Time series data on TAFE course completions are not available to AFCC.

The anecdotal evidence that female school leavers are still drawn to the so-called "clean" end of the engineering profession is further supported by data on women in skilled occupations compiled by the NSW Department of Employment and Industrial Relations:

New South Wales

Occupation	Workforce	% Female
survey draftsman	1,750	15
arch. draftsman	1,750	10
industrial engineer	400	10
architect	2,600	8
civil eng. draftsman	2,750	7
civil engineer	4,650	5
civil eng. tech.	1,500	5
chemical engineer	720	4
electrical engineer	4,900	1
mechanical engineer	3,250	1

Of the professional and technical occupations in NSW, the engineering group has the lowest representation, in line with the national trend.

Conclusions.

Despite the statistics, it could be argued that the construction industry is blameless for the low representation of women in the industry. The evidence suggests that girls are being turned off the industry at school or even before.

Present data is insufficient to draw firm conclusions concerning the rate at which the construction industry could absorb additional workers whether male or female. It is possible that

further examination of Census data may reveal more. The present level of knowledge will not support the setting of a national affirmative action target, and the Act does not demand it.

- Larry King, Director, National Affairs, AFCC

## 15. PROJECT AND CONSTRUCTION MANAGEMENT AGREEMENT

There is currently no standard contract in Australia available for either project or construction management. As a consequence, clients often search for a suitable contract to use to avoid the time, work and cost involved in developing an appropriate contract for a particular project. Of course, a number of companies which act as project or construction managers have their own contracts which they put forward to clients.

The agreement set out in full below can be used for either project or construction management.

It has been used with apparent success by the Public Works Department of NSW for the Opera House forecourt redevelopment, for the Circular Quay development, for Macquarie Street and for the refurbishment of the Mark Foys building and by the Darling Harbour Authority as the construction management agreement for Darling Harbour.

It is understood that no copyright is asserted over it by the Public Works Department. Consequently, consideration might be given to its use for either project or construction management.

It must be understood that this agreement is really in the nature of a cost plus contract.

It is an agency agreement, i.e. an agreement whereby the project or construction manager acts on behalf of the client as its agent in entering into contracts for the design and construction or the construction phases of a project. The agency approach involves a benefit for the client in that it enables direct action by the client against the consultants and contractors, if necessary.

Although cost plus in nature, this agreement contains a significant benefit for the client in that the relationship with the project or construction manager is not adversarial; the project or construction manager is on the client's team.

The agreement contains the flexibility for the client to direct the project or construction manager to carry out whatever work is required. This enables an increase or a decrease in the scope of the work, without the problem of claims and disputes arising under the terms of this agreement.

Apart from the importance of reputation and any potential for action by the client for negligence or possibly breach of contract, the underlying control over the activities and performance of the project or construction manager lies in the client's ability to direct and more particularly the ability to terminate the project or construction manager's services at any time. Indeed, it is understood that on one project a construction manager was terminated under this agreement and a substitute construction manager engaged, without any particular difficulties with respect either to the termination or the continuance of work by the direct contractors.

In conjunction with this agreement, it would be necessary to develop an administrative system with respect to directions,

approvals and reporting. In some projects this has been done by the preparation of a very detailed procedures manual for the project. This is one possibility. There are others. It might be possible to focus on and develop the administrative system for the project by a process of meetings, with the minutes recording the agreement with respect to the administration process. Due to the power of the client under the agreement to direct the activities of the project or construction manager, it would be possible to alter or add to these procedures at any stage.

It would also be possible to add cost control objectives and incentives.

Of course, the contract set out below should not be used without considering its appropriateness to the particular project and the client's requirements. Advice should be sought before using it.

This Contract is made the ..... day of ....., 198

Between ..... ("the Managing Contractor") incorporated in N.S.W. and ..... ("the Client").

### Recitals

1. The Client requires the services of a competent and experienced Managing Contractor to provide design, procurement of materials, management of contracts and other services.
2. The Managing Contractor has extensive experience in the management of large construction projects and has agreed to provide services to the Client on the following terms:

#### 1. Appointment

The Client appoints the Managing Contractor as "Managing Contractor for the ..... Client" for the ..... project. The Managing Contractor agrees to provide services to the Client, as and when requested, on the following terms.

#### 2. Design

When requested by the Client, the Managing Contractor will design various works. The design will be carried out by the Managing Contractor's staff and by consultants engaged by the Managing Contractor. The Managing Contractor will be responsible to the Client for design work carried out by the Managing Contractor's staff and by consultants engaged by the Managing Contractor.

#### 3. Construction

When requested by the Client, the Managing Contractor will enter as agent for the Client contracts for the carrying out of construction work and procurement of materials. The Managing Contractor will be "the Principal" under the contracts but will include in the contracts the statement:

"The Managing Contractor contracts as agent for and on behalf of ..... (complete with the name of the Client) and not so as to itself incur liability under the Contract"

or other words approved by the Client to similar effect. The Managing Contractor will manage those contracts and appoint a Superintendent to administer them. Any liquidated damages or other damages payable by contractors will be the property of the Client.

#### 4. Services

The services to be provided by the Managing Contractor are described generally in the Client's invitation to tender, the