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ABSTRACT

This research was aimed at examining the role of ethics in tendering. To do this is was first necessary to define what is meant by ethics and in the context of tendering and how this relates to the various codes of tendering practice. The next step was to conduct a questionnaire survey to ascertain the extent to which ethical behaviour in tendering is supported and practised in Australia. This showed that most companies support the use codes of tendering, defend the right of withdrawal of tenders, disapprove of bid shopping, cover pricing and union involvement in the tendering process, support the principals' right to know what is included in a tender and the self-regulation of the tendering codes. In addition, most companies have developed, and follow, idiosyncratic ethical guidelines that are independent of, and often contrary to, the nationally prescribed codes. The major conclusion is that a more empirical approach to the development of future ethical prescriptions in the field is needed.

Keywords: Ethics, tendering, codes, restrictive practices.

INTRODUCTION

Ethical behaviour in business is defined as being "legal behaviour and a collection of moral principles or a set of values dealing with what is right or wrong, good or bad" (Beckman, 1963:115), with the set of values being "... shared not only with the business community, but also within society as a whole" (Saul, 1981:270). The importance of ethics in business cannot be understated for, as Schochet (1979:22) observes "... the consequences of corporate activity have a greater impact on lives, business is becoming as much a social institution as an economic one".

There is a commonly held belief in the business community, however, that ethics and business do not mix. Many argue that the two are in direct conflict with each other, that "... the only truly ethical companies are going out of existence" (Saul, 1981:271). As a result, it has been said that business behaviour is "amoral" (De George, 1990:3). This is in contradistinction to immoral, for immorality implies a deliberate act of evilness *per se* whereas businesses, according to De George, simply consider moral ideas inappropriate to everyday business dealings "... because they want to make a profit and therefore disregard some of their actions" (De George, 1990:4).

Over the years, business amorality has been increasingly reinforced by a progressive relaxation of the rules which govern ethical behaviour, leading to laws being "broad and leniently enforced, which has allowed profit maximisation to reign as the ultimate standard by which to assess the property of conduct"

(Carr, 1968:43). Public reactions to this in the Australian construction industry in relation to tendering practice have resulted in the creation of various common codes of tendering to legislatively regulate the industry. Activities such as collusive tendering and the claim for unsuccessful tenderers' fees are regarded as unethical as well as fraudulent.

There is some evidence in the USA that business attitudes are changing and that the number of sceptics of ethical codes may be diminishing. The number of companies adopting some type of ethical codes is said to have increased from 42 percent in 1966 to 73 percent in 1979 (Anon, 1979:1).

In many aspects, the control of ethical behaviour is embodied in the philosophies underlying current systems. Western economic systems, for example, with their emphasis on open competition, rely on such openness being protected. This protection is manifested in the form of anti-trust laws. Similarly, contract law, with the various stringent conditions on what is and is not enforceable, also offers some form of protection against unscrupulous behaviour. The law of tort also exists to support ethical behaviour in making illegal acts or omissions which cause harm or damage to others. This, of course, includes the insistence of a moral duty of care to others as well as penalising acts of negligence. Like-wise, accountability, that is "... the obligation of giving (or being prepared, if called upon to give) an account of one's actions" (De George, 1990:93), is also a legally enforceable in certain situations under both law of contract and tort.

The business of tendering for construction contracts has a large ethical component that is supported to some extent by law (although being necessarily pre-contract, is not supported by the law of contract). There are, however, many ethical issues associated with tendering that are not supported by law - ranging from the costs incurred by unsuccessful tenderers, equitable tendering practices and rights of disclosure to the declaration of conflicts of interests. In Australia, and many other countries, the appropriate ethical behaviour for these issues is prescribed in codes of tendering practice. What is of interest is the extent to which these codes represent a valid ethical position and are adopted or exploited by tenderers and principals.

This paper introduces the topic of ethics in tendering, its philosophical grounding, and codification in the Australian construction contract industry. A questionnaire survey is described in which the views of principals and tenderers are solicited concerning the ethics of tendering in relation to tendering codes. The results of this survey are then presented which show that, for the sample investigated, most companies use codes of tendering, defend the right of withdrawal of tenders, disapprove of bid shopping, cover pricing and union involvement in the tendering process, support the principals' right to know what is included in a tender and the self-regulation of the tendering codes.

ETHICS

Ethics is the branch of philosophy that investigates morality and, in particular, the varieties of thinking by which human conduct is guided and may be appraised (Bullock and Stalybrass, 1980). The basic concern of ethics is of the meaning and justification of utterances about the rightness and wrongness of actions, in particular:

> *Intention*. The virtue or vice of the motives which prompt them
>
> *Means*. The praiseworthiness or blameworthiness of the agents who perform them, and
>
> *Ends*. The goodness or badness of the consequences to which they give rise.

Several fundamental, and as yet unresolved, philosophical problems arise out of these concerns:

> *Facts*. If moral utterances are really the statements of fact, true or false, that they grammatically appear to be, are they empirically statements about such observable characteristics as conduciveness to the general happiness, as ethical naturalists (*cf* Furst and Skrine, 1969) maintain, or are they *a priori*, as ethical rationalists (*cf* Hospers, 1967) maintain?. If they are not statements of fact, as adherents to the doctrine of the naturalistic fallacy (*cf* Moore, 1903: ch 1), and, in particular, emotivists (*cf* Urmson, 1968), believe, how are they to interpreted - as exclamations or commands?
>
> *Concepts*. What is the relation of moral concepts to each other, is the rightness of actions inferable from the goodness of their consequences, and is the virtuousness of a motive to be inferred from the rightness of the actions that it typically prompts?
>
> *Axiology*. How can moral values be distinguished from values of other kinds (*cf* Wright, 1963), is the distinguishing mark the factual nature of the ends by reference to which moral injunctions are justified, such as the happiness of mankind in general, or is it in the formal character of the injunctions themselves?
>
> *Judgements*. What are the conditions under which moral judgements are properly applicable to conduct? To be morally responsible, to be liable to the sanctions of blame and punishment, must an agent be free in the sense that his actions are uncaused, or is it enough that what he did was not wholly caused by factors that sanctions cannot influence? (*cf* Hospers, 1961; Frankena, 1963).

In the absence of any decisive solutions to these deep philosophical problems, it is to be expected that a high degree of ambivalence will prevail both within and between individuals and groups of people in their attitudes to ethical issues. However, until such time as solutions to these problems are found, and for communities to avoid the perils of anarchy and operate in an orderly manner, some pragmatic measures or principles have had to be adopted. These principles are currently manifested in codes of behaviour which reflect, more or less, the nature of prevailing political, legal, economic and cultural mores of the communities affected.

ETHICAL PRINCIPLES IN TENDERING

Major ethical issues in tendering

The literature reveals five major issues with ethical implications. These comprise (1) withdrawal, (2) bid-cutting, (3) cover pricing, (4) compensation of tendering costs, and (5) collusion.

Withdrawal

Tenderers have the right by Australian law to withdraw a firm offer before the closing of tenders and a formal acceptance of that price is made. This is to accommodate tenderers' late discovery of (1) a major miscalculation, (2) lack of interest or (3) lack of technical expertise. The practice is, however, open to abuse by tenderers when faced with the prospect of another, more lucrative, contract. In order to avoid possible over-commitment, or just in greed, contractors in this may seek to withdraw the tender for the less lucrative contract. If this practice was widespread, the principal could end up in the position of receiving no competitive tenders and thereby delaying the start of the contract until further tenders have been solicited. This can cause major problems for the principal in having to reschedule the work, late completion (and therefore loss of income in the form of rents, profits etc from a new building. If re-tendering is necessary, the additional costs of re-tendering will affect not only the principal but also the new tenderers.

The very short times involved in construction tendering, where tenders are usually not forwarded until the eleventh hour, suggest that this procedure is not often used (not receiving any quote at all from subcontractors, especially in boom times, is a much greater risk).

Bid-cutting

The construction contract market contains many sellers and buyers, even for the same construction project. The principal 'sells' the main contract to the main contractor, the main

contractor 'sells' subcontracts to subcontractors, subcontractors 'sell' further contract of the supply of materials, etc, and so on down the line.

In theory at least, bid cutting can take place at any point in the project delivery process and can be exercised by any of the contract 'sellers' involved. The sellers may hunt for the best deals available from buyers by any means at their disposal. This can be either passive, by simply asking buyers for prices, or active, by negotiation from the basis of either an original buyer quote ('bid-peddling'), competitors' quotes ('bid-shopping') or a seller budget figure which may be a purely arbitrary figure, based on factual or fictitious competitors' prices, or standard prices from published lists such as the Cordell or Rawlinson cost guides.

In economic terms, there seems to be little wrong with this, the price of the contract depending on the level of demand for these subcontracts. As long as the contract market is freely accessible and buyers are free to choose the contracts they wish to pursue, an efficient economic behaviour is maintained.

As already mentioned, ethical questions concern the intention, means and ends of those involved in the practice, in this case the sellers. Once tenders for the main contract have closed, the intention to bid cut can be justified by main contractors due to a lack of time in the tendering period, a lack of enthusiasm from subcontractors or difficulty in obtaining prices from subcontractors etc. If the intention of the seller, however, is purely to enhance his own profits, the intention, though economically rational, can be seen as unethical. From the principals viewpoint, for example, bid cutting by the main contractor might be regarded as improper if the lowered the costs of subcontracting are not passed on to the principal in some way (eg by an equivalent reduction in the main contractor's tender or through the terms of the contract itself). Similarly, a subcontractor in this situation could feel himself to be exploited, In both cases the accusation again is that of greediness of the main contractor as a result of an overly short-term view and at the expense of potentially valuable long-term relationships. In contrast, a main contractor might claim with some justification that the extra profits are needed to compensate for the disproportionately high levels of risks involved in main contracting compared with subcontracting and for which the competitive tendering system fails to adequately provide (risk values being regularly underestimated, especially by those contractors new to the field, leaving most construction projects insufficiently resourced).

It may be fair to seek a reduction in a buyer quote if the seller honestly believes that the contract has been overpriced by the buyer, especially if the seller has a preference towards a regular 'customer' or the contract involves work of a specialist nature. Commonly the cheapest price is not necessarily the best value for money, so preferred buyers should be given the opportunity to lower a quote for other reasons (eg

quality of workmanship, time on job, loyalty, etc). Another regularly used method of obtaining cheaper prices from experienced and preferred buyers, is to arrange bulk deals which would ensure that their services were produced at a lower rate.

What is often thought to be one of the most iniquitous aspects in the main-contractor-sub-contractor relationship is the main contractors' exploitation of the sub contractors' ignorance. A particular example of this is in legal issues concerning the construction contract itself, where detailed knowledge is of a specialised nature and sometimes available only at a cost affordable by the main contractor and not the sub contractor. In such cases, the superior technical knowledge of the main contractor may be used at the unfortunate sub contractor's expense.

With bid cutting, the opportunity exists for unscrupulous sellers to use this as a means of achieving a covert part of a longer term strategy to lower buyers' prices by pretending that the prices are needed for a current contract they are trying to buy. The seller can then treat these prices as a precedent when compiling a future tender by reminding the buyers of these prices at a later date. To counter this, buyers have several strategies available: insisting on the one-off nature of the reduced price; trying to ensure that sellers have a genuine intention to employ them on the current contract; refusing to provide quotes to known or suspected bid cutters. At post tender stage, however, main contractors are in an even stronger position to pressurise subcontractors and suppliers into reducing their prices as there is a greater certainty of the main contractor, and therefore the subcontractors, actually doing the work and therefore less risk of underemployment. As a result, main contractors are often able to reduce subcontractors' quotes by simple unilateral action.

Another potential problem associated with the means involved in bid-cutting is that of disclosure. A buyer may feel that his best prices are being regularly abused if the seller freely distributes his price around. To counter this, buyers can adopt an eleventh hour strategy.

An end product of bid cutting is that buyers can come to depend on sellers for their work, placing the sellers in what is essentially a monopolistic position. The effect of this, as with any monopolistic situation, is to weaken the buyers' strategies by creating the potential for sellers to jeopardise the buyers' future workload. A further problem is that if buyers have to reduce their prices too far, they may not be able to avoid making a loss and ultimately go out of business. For a main contractor get 'burned' in this way seems to neither the main contractor or subcontractors' advantage. Indeed, the interdependence of main and subcontractors can lead to the situation where the insolvency of one causes the insolvency of the other.

Cover pricing

Cover prices are quotes tendered which have been provided at a rate specifically designed to lose a tender but which appear to be competitive. The major reasons for the issuing of cover prices appear to be:

1 Little buyer interest in the contract for sale
2 Lack of buyer resources to competently complete the work
3 Shortage of time for buyers to compile tender
4 A desire to remain considered for future sales; and
5 Little chance of winning due to the large number of competing buyers for the same contract

In many countries the practice is not illegal. In Australia, however, by directly attempting to lessen the standard of competitiveness in the tender, a building contractor guilty of providing a cover price is in breach of Section l S of the Australian Trade Practices Act.

There are several reports of cover pricing, sometimes termed 'non-serious' bids, in the UK, including Whittaker (1970) and McCaffer (1976). An opinion survey (IQS Sussex Branch Committee, 1979) found that cover prices are taken despite attempts to prevent the practice but further concluding that the cover prices "did not distort the market prices". Daniels (1978), in describing the work of the Builders' Conference, revealed that tenderers admitted to the use of cover-prices because of the cost of bidding, the high risk of losing, not wishing to offend and the short period allowed for tender preparation. Moyles (1973) has suggested that, because of these constraints ".. contractors will usually give detailed attention to only desirable contracts", the remainder being "... prepared in a more approximate manner with a risk allowance to cover for unforseen circumstances and for the less accurate method of estimating". Indeed, discussion at a conference organised by the Building Trades Journal (1979), openly revealed the practice of taking such covers, discussing alternative methods of acquiring such prices.

The problem with cover pricing of course is that, whether or not a cover price is provided with good intentions, it still results in a lessening of real competition. It also has te potential to lead to corruption and collusion between tenderers as the value of the cover price can only be obtained by the cover pricer contacting a genuine tenderer for an order of magnitude figure.

Current folk-lore, however, suggests the practice is used to some extent, albeit unofficially. Despite its illegality in Australia, there are some economic arguments in its favour. One of these concerns the lapse of time that occurs between a tenderer agreeing to provide a tender and the deadline for the receipt of tenders. During that time, unforseen circumstances can make the provision of a detailed, non-cover, price inappropriate. A change in the buyer's market orientation, reduction in available construction and/or estimating resources,

new knowledge of the number and competitiveness of the competing tenderers. Another possibility is that the buyer discovers during that time some defect in the seller, such as a policy for not inviting non-tenderers to tender for future contracts, or unethical behaviour!

Compensation of tendering costs

The costs of tendering are a recognised expense which many would argue represent a large proportion of general overhead costs. The question then is where the burden of these costs should lie. Should principals be required to help construction contractors by reimbursing them directly with part or the whole cost of tendering, or should the tenderers carry the whole of the costs themselves?

If principals have to reimburse tenderers, it is possible that tenderers could find some way of making a profit by obtaining an over-reimbursement by, say, surreptitiously producing quick, cheap and deliberately uncompetitive tenders, termed non-*bona fide* tenders. Whether or not a tender is *bona fide* can be difficult to know especially in selective tendering. This would of course be open to abuse as non-*bona fide* tenderers might act collusively and charge for remaining non-competitive. This would eventually ruin the competitiveness of the tender, and as such be in breach of the Trade Practices Act, ultimately resulting if undetected, in financially hurting the principal. Collusion is examined in more detail below.

There may be an argument for compensating costs in negotiated tenders or design and construction for a client, however. To be fair to all players, payment for estimating services in lump sum and especially open tendering might not be practical unless the contractor was required to submit its own bill of quantities. The compensation of unsuccessful tenderers has been well documented in the press over the last few years especially with the recent Royal Commission into Productivity in the Building Industry of New South Wales (Gyles, 1993). One of the fundamental discussions of this report must be to determine whether or not it is commonly acceptable to the industry to load tender prices with fees which will be used to directly compensate unsuccessful tenderers.

Another possibility is for sellers to provide compensation to tenderers in the event of an abandoned or postponed contract sale. Standard codes of tendering state that tendering should not be invited unless there is a firm commitment by the seller to proceed with contract sale. Often this may require further negotiation to adjust the scope of works quality of workmanship etc.

Collusion

Collusive tendering occurs where several buyers have been

invited to tender and the buyers agree between themselves either not to tender, or to tender in such a manner as not to be competitive with the other buyers. This method of price control is in direct breach of Section 45 of Australia's Trade Practices Act as it seen to be a potential means of fixing, controlling or maintaining prices which may have the effect of substantially lessening competition. Construction tendering codes of ethical conduct support this view and prohibit "collusion on tenders, inflation of prices to compensate unsuccessful tenderers, hidden commissions or any other such secret arrangements" (Standards Australia, 1993:6).

The main reasons for the practice are that it provides (1) an even distribution of work for all involved, (2) a means of entering what is an apparently *bona fide* bid, and (3) a means for discursion and agreement over illicit profit making such as amounts for cover prices, secret fees or unsuccessful tenderers fees. The practice, or possibilities for the practice, of collusion therefore is a factor in several other issues related to ethical tendering. The problem with collusion is that it is contrary to the ideals of competition. It only benefits those parties to the agreement at the expense of those outside, including principles and other contractors.

Sheldon (1982) has examined collusion in the UK in some detail. In view of the uncertainty of competitive bidding and the degree of interdependence between firms engendered by such uncertainty, Sheldon holds that tendering may be conducted *a priori* through collusive agreements as such agreements are "... an attractive means of maintaining a steady flow of work and achieving higher joint, risk-adjusted, discounted profits". Little evidence of collusive agreements seem to be available however, which is perhaps to be expected. Sheldon's view of the process plant industry is that the variety of process areas in contracting and also periodic excess capacity would be a destabilising factor in any such agreements. Barriers to entry of the industry are also discussed but is concluded that "... the ability of firms to actually raise bid prices in excess of an average cost is a function of the buyer's sensitivity to price and non-price factors in a bid, rather than a function of the barriers to entry, and hence the ability of firms to actually limit prices is curtailed by the buyer's power".

For the contraction industry, effective collusive bidding seems even less likely than the process plant industry as barriers to entry are far less severe and the proliferation of projects is extensive, especially small projects. Collusion, if practiced at all in the construction industry, must surely be restricted to a very limited number of specialised projects.

The definition of collusion can also be applied to the process as well as the outcomes. The very fact that tenderers communicate with each other can be taken to be a form of collusive behaviour. This raises the question of whether any discussion should be allowed, and, if so, the range of topics allowable. It might be thought, for instance, that an exchange

of standard unit prices ('price-books') is collusive but that a general discussion of tendering arrangements, conditions of tendering and prices submitted for previous contracts, and the likely ethical behaviour of specific sellers, is not. This raises a possible contradiction between what is necessary for effective competition, in the access to relevant information, and what may be used by tenderers to restrict competition by restrictive agreements. That such agreements may be overt, covert, express, implied or even inadvertent, makes the issue that much more difficult to decide.

Formal communications between main contractors are provided by builders' associations and their involvement in the cooperation and assistance of collusive tendering agreements have been exposed in the recent Royal Commission. The Royal Commission uncovered involvement by the NSW MBA, the Newcastle MBA and the AFCC in the organisation of secret meetings of tenderers and subsequent special fee charges. These meetings had various purposes including the discussion of tendering conditions, but have been exposed as a place for the discussion and agreement of payments to be made in Unsuccessful Tenderers' Fees and Special Fees to be secretly loaded into the cost of each participating tender. As the Royal Commission has discovered, the organisation and planning of secret commissions and fees were extensive and have caused a deserved loss of respect towards the building industry in New South Wales. Builders' associations and unions are, however, required to be involved with successful tenderers to negotiate site conditions, allowances etc (except in the housing industry).

Codes of tendering

The ethical principles in tendering are formally prescribed in the codes of conduct related to the tendering process. In Australia, these are intended to benefit industry "through the delivery of higher productivity, high quality of work, better working conditions and the elimination of malpractice" (Standards Australia, 1993:4).

The codes are designed to delegate responsibilities to both competing tenderers and the principal (client, owner) to achieve a theoretical balance between what is right and what is common-sense for each individual project. They are applicable both generally - to many of the traditional forms of contracting (eg lump sum or design and build) - and specifically - to projects of a less standard nature (eg restoration work) or where the risks involved are difficult to determine or delegate. These are typified by the Interim Australian Standard Code of Tendering, AS 4120 (Int), which prescribes twelve basic principles:

" 1 Tendering at all levels in the industry shall be conducted honestly and in a manner that is fair to all parties involved.

2 Parties shall comply with all legislative obligations including those required by trade practices and

consumer legislation.

3 Principals shall have regard to the costs of bidding and the number of tenderers.

4 Tenderers shall only bid where they intend to carry out the work if successful.

5 Principals shall only call for tenders after they have made a firm commitment to proceed with the project.

6 The conditions of tendering shall be the same for each tenderer.

7 Parties shall not engage in practices such as collusion on tenders, inflation of prices to compensate unsuccessful tenderers, hidden commissions, or any such other secret arrangements.

8 Principals, contractors and suppliers shall be prepared to attest to their probity, if necessary by Statutory Declaration or other reasonable means.

9 Tender documents shall specify the principal's requirements as clearly and precisely as possible and, when documents are altered, sufficient time shall be allowed for all tenderers to review and revise their tenders.

10 The confidentiality of all information provided in the tendering process shall be fully preserved, however, it is acceptable to have public openings of tenders and disclosure of tender prices.

11 Any party with a conflict of interest shall declare those interests.

12 Tenderers shall retain their right to intellectual property with tenders, including title thereto." (Standards Australia, 1993:4).

Clearly, if the injunctions contained in the codes are to satisfy the ethical purpose for which they were designed, they must engender behaviours that are ethically appropriate. The problem, of course, is that this may not be fully realised in practice. The ethical principles themselves contained in the codes may not be 'correct'. Even if correct, the wording of the codes may not be in one to one correspondence with the principles espoused. Also, the players affected may not respond fully to the letter or spirit of the codes. Indeed, some players may seek to find ways, perhaps covertly, of deriving commercial advantage from the shear fact that the codes exist, at the expense of others who are more ethically inclined.

The extent to which these issues are amenable to empirical investigation is not known in the field of tendering ethics as it is simply assumed that the issue of prescriptive, and occasionally normative, rules is all that is needed. In view of the above considerations, not only does such an assumption appear to be untenable but some empirical possibilities are immediately apparent. As ethical considerations are essentially concerned with human perceptions, whether of factual or value issues, the use of a research instrument designed to record such perceptions would seem to be the most appropriate approach. The simplest and most obvious such instrument is the questionnaire. The use of a questionnaire will enable some measures to be

obtained on the key problem areas relevant to tendering ethics, *ie* the extent to which tendering codes (1) reflect the ethical notions of tenderers and the community at large, (2) conflict with professional codes, (3) are overtly or covertly considered, rejected, accepted and adopted by tenderers and (4) the resulting implications on their business operations in the form of commercial secrecy or surreptitious behaviour.

RESEARCH DESIGN

In the absence of any known previous research in this field, attention was concentrated on the extent to which the 'principles' embodied in the Interim Australian Standard Code of Tendering, AS 4120 (Int) were accepted and applied in construction tendering, in order to test Saul (1981) and De George's (1990) assertion that businesses were not able to accommodate such ethics in their business mores and practices.
A questionnaire was designed to elicit views on each relevant ethical item in the code. This comprised four sections. The first section offered respondents the opportunity to choose whether or not their answers should be kept confidential. The respondents' professional industry involvement and their major forms of contract work were also requested to allow any cross-group differences to be detected. The second section requested information on the use of codes of ethics in everyday business practice, the satisfaction with these codes and methods of possible improvement. The third section was concerned with the topic of ethics in bidding procedures and general business attitudes in tendering including the timing for the withdrawal of tenders, the practices of beating down prices and the submission of cover prices. The fourth section related to the theory and practices of unethical business behaviours in tendering, in particular the payment for estimating services, collusion between competing tenderers, compensation for unsuccessful tenderers, and the intervention of building unions or associations in such dealings. Finally, respondents were offered the opportunity to freely speak on any areas of particular interest, including any comments for or against matters raised in the discussion.

Naturally, obtaining honest factual information for a topic as controversial as ethical and unethical practices in construction tendering is not an easy task and it was expected that many organisations would not respond. The questionnaire was therefore designed to provide anonymity and obtain the greatest number of responses possible.

The questionnaire was then distributed to one hundred potential respondents comprising building contractors, subcontractors, architects and quantity surveyors in Brisbane, Cairns, Sydney, Melbourne, Hobart, Canberra, Adelaide, Perth and the Northern Territory. Each respondent was provided with approximately two weeks to answer the questionnaire.

The responses to the questionnaire were then summarised in total

and in disaggregated form by the type of respondent, *ie* architects, quantity surveyors, building contractors and subcontractors, for analysis and interpretation by the researchers.

RESULTS

A total of forty (40%) completed questionnaires were returned. The highest number of responses came from building contractors (13) while the greatest percentage of respondents to those invited were quantity surveyors (67%). The least number of responses were from subcontractors (7).

Statistical responses were grouped into their number and percentage categories for "Yes", "No" or "Not Applicable/ Irrelevant" answers. In cases where individual answers were left blank, each response was compared to the total number of responses to each particular question. The total response is summarised in Table 1.

Section 1: General matters

Confidentiality

The first question was designed to determine the respondents' confidentiality requirements and to reassure respondents of their right to speak freely without recourse if they so chose. 61% of respondents chose to keep their responses confidential.

Professional identification and major types of contract

Questions 2 and 3 sought to identify respondents' place within the industry and their major types of work involvement. The greatest number of respondents were building contractors involved in lump sum tendering. Lump sum was also the most common form of contract tendering system involving the respondents. Other major forms of contract procurement used were design and construction, construction management, and negotiated tenders.

Section 2: Codes of tendering

The majority of respondents (77%) claimed to follow a standard code of ethics in their everyday work oriented towards their professional training (question 4). There was no one most common form of standard produced code of ethics used in general practice by the respondents. The variety of those in use included QMBA, HIA, Australian Standard Code of Tendering, State Government Codes of Tendering, and the JCT (Joint Contracts Tribunal) Code of Conduct for Selective Tendering. The majority of those respondents (79%) who do follow a set of tendering procedures, whether standard or in-house, were satisfied with the requirements of those codes.

Some of the respondents have their own company policies to protect themselves from exploitation when submitting prices. One practical example of this was a plumbing subcontractor provided quotes only to main contractors known not to indulge in bid shopping.

Section 3: Ethics of bidding

Permissible withdrawal of tenders

A large majority (88%) of respondents defended the right for tenderers to withdraw offers before the closing of tenders (question 8).

Bid Cutting

Question 9 dealt with the fairness of asking subcontractors to lower their quotes in pre-tender estimating. Many respondents (59%) believed it to be a fair and practical business method for winning tenders. The majority of main contractors (67%), however, supported the practice, provided the subcontractor concerned is compliant.

Whether this should apply after a tender has closed and a contract has been awarded is investigated in question 10 which is concerned with respondents' attitudes towards main contractors unilaterally reducing subcontractors' quotes after the award of a contract. Most respondents (72%), believe the practice to be unethical, with a fairly large proportion of building contractors holding the opposite view.

Question 11 sought to discover whether or not the respondents believed in asking a preferred subcontractor to lower their quote to a rate below a less preferred competitor. Commonly, 11% of all respondents felt that preferential subcontractors should be given the right to lower their quote to beat a less favoured competitor. 42% of building contractors agreed with the practice believing that the construction industry is a competitive market where subcontractors are free to adjust their quotes if they so chose. Some of the respondents felt that if there was no genuine intention to use a subcontractor pricing a job, then they should not be invited to submit a tender.

18% of total respondents admitted to the practice of providing an open quote in the hope of bettering the price (question 12). A greater percentage (33%) of building contractors agreed with this method of price reduction than the overall range of responses. The majority of respondents disagreed with this practice.

Cover Prices

Question 13 asked whether having been invited to tender, the respondent believed in the theory of submitting cover prices for work they either did not want or could not afford the time to tender on. 64% of respondents did not believe in the theory of covering. A similar rate of 65% of building contractors also disagreed with the practice.
When asked in question 14 had the respondents themselves ever submitted a cover, 34% admitted that they had. Of the building contractors questioned 46% confessed to submitting cover prices in tenders.

Question 15 sought to discover whether or not the respondents knew of other contractors using cover prices. Many (64%) of the respondents said that they knew of other companies who used cover prices. 67% of building contractors also knew of others who used cover prices. One subcontractor (who did not choose to keep all the answers confidential) stated that providing covers was "standard practice in the electrical industry".

Section 4: Unethical practices

Collusive Tendering

Question 16 considered the issue of compensating the cost or estimating over and above those accounted for in the cost of general overheads. Although there was no clear trend, a substantial response of 55% believed that building contractors should be paid for tendering. Of the building contractors questioned. 54% agreed that they should be reimbursed. Several respondents stated that builders should not be paid for the service or otherwise many builders would establish themselves as professional losing tenderers.

An inconclusive 46% of respondents believed that competing tenderers should be allowed to discuss between themselves certain matters of importance to the submissions (question 17). Of the building contractors questioned, a split response of 50% stated that they should be free to discuss these matters. Some of the respondents stated that prices or rates should never be discussed in such meetings. Another subcontractor stated that tenderers should be able to discuss tendering arrangements or participation if they feel difficulty or distrust with the developer.

Question 18 discussed the principals' right to reject offers and asked whether they have the right to know what has been included in a tender. Of the respondents questioned, a high 82% felt that they have a right to know what issues have been included. Similarly 88% of building contractors also agreed with the principal's right to know what has been included in a tender. One quantity surveyor respondent believed that the principal should already understand the scope of works but profit, overheads, and prices etc, were not the principal's business. Another however suggested the co-operative practice of "partnering" (used extensively in Europe) would be beneficial in

Australia but would require the full disclosure of costs.

Question 19 asked whether tenderers, *bona fide* or not should be compensated for the costs of producing a losing tender. A total of 79% of all respondents disagreed with the payment of estimating services. Similarly, 77% of building contractors also chose to disagree with the theory of compensation for unsuccessful tenderers.

Question 20 sought to gain industry opinions of the issue of collusive tendering over the compensation of unsuccessful tenderers fees. A high 79% of respondents did not agree that competing tenderers should be allowed to meet and discuss amounts to be awarded to each party. Of the building contractors questioned, 95% disagreed with collusion between tenderers over this issue.

Association Involvement

A very high 93% of respondents to question 21 objected to any potential association involvement in the tendering process. Similarly the total response from building contractors agreed that builders' associations should be prohibited from any dealings in the tendering phase.

Finally, question 22 dealt with personal knowledge of collusive dealings that have occurred, perhaps involving the cooperation of builders' representative associations. Of those questioned, only 27% of respondents claimed that they were aware of direct examples of collusive dealings in the industry. Few (8%) of participating building contractors actually knew or were prepared to admit to knowing of any such arrangements. Several of those respondents who claimed to have some knowledge of the practice cited press reports from the Royal Commission as their sole source of information. One stated that to the particular respondent's knowledge, many more examples of collusive dealings go unreported.

Section 5: General comments

Respondents were given the opportunity in question 23, to add any further comments of interest on the topic and that they were free to agree or disagree with any points raised in the discussion.
Several commented that, although business ethics are desirable, tendering ultimately involves making hard commercial decisions, especially in recessionary times.

One respondent believed that pre-tender subcontract negotiation was the art of obtaining keen prices for the benefit of the owner.

The plumbing contractor previously mentioned (to whom confidentiality was not chosen) said "the building industry in

this state (W A.) is stuffed". This respondent claimed that there are too many subcontractors with little business sense who flood the market, lower the accepted industry rates by not paying the industry awards and insurances, do the work at unrealistically low amounts, successfully cause the rest of the industry to appear overpriced and eventually go out of business. This encourages the larger builders to shop an honest subcontractor's price used in a tender, after the award of a contract and "try to knock 10% to 15% off your quote".

The unethical behaviours of many principals were a major concern to one contractor who has been regularly disappointed with: projects that did not proceed; incomplete tender information: disclaimer clauses in contracts; suspect tender evaluation: acceptance of lowest tenderers who may be of poor quality or eventually more expensive; bid shopping to other contractors; difficulty in approving variations, and; complicated company structures of owners in receivership situations. Business ethics will always be determined by individuals and there are the good and bad in every sector. The difficulty lies in their differentiation.

Another respondent stated that in the case of major works involving design and construction, and possible lump sum tendering, the award of compensation could be warranted if the sum was nominated by the principal and agreed to by all tenderers. However several respondents claimed that the compensation of estimating costs would lead to a lessening of competition as some would become "professional tenderers" that is they would intentionally price their work too high to live off the compensation. Eventually if selections are kept keen and regularly updated, this practice could not continue for long.

An architect respondent commented that, in his experience, where collusion is evident, one contractor will "come to the fore" as not wishing to participate in the collusion with others. Nevertheless it displays the vital importance of the selection process in obtaining reputable, honest tenderers.

DISCUSSION

There are few surprises in these results. The support for the right for tenderers to withdraw offers before the closing of tenders was expected. Similarly, the support for bid-cutting was mainly from those would were expected gain the greatest benefits from the practice - main contractors and, to some extent, principals.

That most respondents did not believe cover-pricing to be ethical is surprising, especially as one third the respondents', and almost half the main contractor respondents, admitted to the practice. This ambivalence between theory and practice seems to be that the theory is overly inflexible. Clearly, as some respondents claimed, there are some circumstances, *eg* where

there is a likelihood of being left out of future tender lists, where the practice can be justified.

In view of the difficulties in identifying non-*bona fide* tenderers, it is not surprising to find that most respondents, including main contractors, disagreed with the payment of estimating services to all tenderers. There is a significant minority that approve of this procedure however to suggest that it is worthy of further investigation.

SUMMARY AND CONCLUSIONS

This paper introduces the topic of tendering ethics in relation to the philosophical foundations of ethics and current codes of practice in the area. A questionnaire survey is described aimed at determining industry opinions and practices of ethical tendering procedures and in which information was gained through the distribution of an Australia-wide questionnaire to persons involved with the tendering process. Forty completed questionnaires were returned out total of one hundred questionnaires distributed.

The findings of this survey are that:

- Most (61%) respondents felt the issues to be sufficiently sensitive to require anonymity of their responses.

- Lump sum tendering is the most common method of contract procurement to the participating respondents, although design and construction, construction management and negotiated tenders are also used.

- Many (77%) companies claim to use codes of ethical tendering procedures but with no clear favourite emerging. Company or in-house codes of ethics are very common due to the desire for self-regulation and need for ethical rules in business decision making policies.

- The right for permissible withdrawal of prices is defended by most respondents (88%).

- There is a majority (59%) support for the practice of asking subcontractors and suppliers to reduce their prices to be used in a tender providing that the reduction of subcontract prices should not be used to increase the contractor's margin.

- There is general disagreement (72%) with the practice of asking for a reduced subcontract price to meet a building contractor's budget, given that adequate time has been made available for keen pricing of work.

- The practice of inviting preferred subcontractors to beat the price of less favoured ones' is partially accepted (41%).

- A minority (33%) of building contractors value the practice of bid peddling.

- A majority (64%) disagreed with the practice of cover pricing. Nevertheless it was found that the provision of covers is a commonly accepted method of tendering.

- A majority (55%) believed that tenderers should be reimbursed the cost of tendering. An even greater majority (79%) however considered it unacceptable for competing tenderers to receive compensation for the costs of producing a losing tender. Many believed that competing tenderers should not be allowed to discuss and/or charge unsuccessful tenderers' fees without the prior consent of the principal.

- There is no clear agreement, either for or against, for general discussions between competing contractors over prices, tendering conditions etc.

- There is strong support (82%) for principals having the right to know what has been included in a tender provided that this knowledge is limited to the scope of works only.

- There is a near unanimous (93%) view that building associations or unions should take no part in the tendering process.

- That codes of ethics should be determined by self-regulation always staying within the statutes.

These results do not support Saul (1981) and De George's (1990) assertion that businesses are not able to accommodate ethics in their business mores and practices. Clearly, if the veracity of the answers to the questions posed in the survey is accepted, ethics are very much accommodated, insofar as tendering practice is concerned. It is also clear, however, that the ethical principles contained in the tendering codes, are not completely accepted or adhered to by all the players involved. This leads to two important practical questions concerning the ethical validity of the codes themselves - are the codes right or wrong and, if they are wrong, how can they be put right?

The answer to the first of these questions depends on the, as yet unresolved, status of ethical principles in general. Considering the likely alternatives:

The ethical naturalist view. If the principles contained in the codes are really empirical statements of fact about observable characteristics, then there should be some extant evidence of this empirical basis. There is no such evidence and therefore no grounds for supporting the ethical validity of the codes.

The ethical rationalist view. If the principles contained in the codes are *a priori* statements that are true but not yet

substantiated by any evidence, the case is much stronger but inconclusive, as the evidence, if and when it comes along, may either support or reject the *a priori* position. In this case, the codes must stand until either an alternative *a priori* set of principles is proposed or the empirical evidence is forthcoming.

The emotivist view. If the principles contained in the codes are not to be regarded as factual but simply a matter of personal judgement, then the issue turns on the validity of the judgements made in constructing the principles. On the evidence provided in this survey, this position is being held by many of the respondents as each bring their own judgements into play in the form of their own ethical policies. Of course, this provides no insights into the validity of each player's view but does suggest that the underlying mechanism of the ethical behaviour to be emotivist.

It appears, therefore, that the validity of the principles contained in the codes, and therefore their ethical validity, is uncertain. As a result, the failure or otherwise of the players to observe the codes, provides little guidance on either the ethical validity of the codes or the actions of the players. This conclusion, although of little pragmatic value, nevertheless does suggest why the problem of code setting and enforcement has been so difficult to resolve. It is encouraging, however, that there seems to be a general willingness by the players for a solution to be found.

Two possibilities are immediately apparent. The first is to accept the emotivist position and continue with the present system in which the players each follow their own ethical inclinations either in conjunction with, or in opposition to, the formal prescriptions. As the survey has shown, this is not only exactly the current situation but also considered to be inadequate by the players involved. The second is to adopt a more rational approach through empirical analysis of the effects of alternative ethical principles in terms of perceived happiness or equitable outcomes of the stakeholders. One approach to this is to develop an *a priori* set of principles for empirical testing. Such *a priori* principles could be developed either from a theoretical framework, the current codes, or an amalgam of existing emotivist codes, perhaps through a compromise between players. This would seem to offer a real prospect for progress in the field.

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Table 1: Aggregated results of the questionnaire

Ray, Richard S. and Hornibrook, John and Skitmore, Martin R. (1999) Ethics in tendering: a survey of Australian opinion and practice. *Construction Management and Economics* 17(2):pp. 139-153.