

CIVIL CONTRACTORS FEDERATION

SUBMISSION TO the ACCC in respect of:

**An Application for Authorisation (A91103) for
collective negotiations by owner drivers with earth
moving contractors in South East Queensland**

November 2008

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The Civil Contractors Federation

The CCF is the member based representative body of civil engineering contractors in Australia providing assistance and expertise in contractor development, industrial relations and industry issues.

The Civil Contractors Federation (CCF) is a registered employers' association in terms of the *Workplace Relations Act 1996*.

Through our Federation we represent 2000 small, medium and large sized contractors who in turn employ more than 40,000 people. In Queensland we represent 130 contractors and some 80 Associate members.

Our members are involved in a variety of projects and activities including the development and maintenance of civil infrastructure such as roads, bridges, dams, wharves, commercial and housing land development.

Members range in size from small one person operations through to large civil engineering companies.

As such a number of CCF members operate throughout the state of Queensland including the geographic location indicated in the Application for authorisation ("the Application").

Introduction

The CCF opposes the Application by the CFMEU for authorisation to collectively negotiate on behalf of certain owner drivers of Earthmoving / Haulage equipment.

The outcome of any collective negotiations and the introduction of industrial concerns through a registered Trade Union in commercial negotiations within the Civil Construction Industry will not result in a benefit to the public and will generate a detriment through the likely lessening of competition.

1. The Structure and Operation of the Civil Construction Sector

1.1 Structure

The Application deals specifically with owner/drivers of “earthmoving services” however, the CCF submits it is important for the Australian Competition and Consumer Commission (ACCC) to consider this issue in the broader context of industry as a whole.

The civil construction sector of the construction industry is the construction and maintenance of civil structures such as, roads, bridges, dams, water supply and sewage, ports, sub-divisions and non building infrastructure works. This work may be undertaken:

- In locations that are environmentally sensitive;
- Within communities where noise and dust pollution need to be managed carefully;
- In communities where heavy vehicle traffic is a concern;
- In constrained or complicated brown field sites;
- In areas where dangerous or contaminated waste is involved.

The sector utilises a range of skills through either employees or sub contractors in the occupations of tradespersons, plant operators, truck drivers, crane operators and construction workers.

The sector utilises a variety of contract arrangements including lump sum guaranteed maximum price (fixed price) and alliance contracts, to cater for the variety and range of works that fall within the sector. There is an inherent need for a flexible market in the provision of the skills to provide the best outcome for clients and the public as well as industry stakeholders.

1.2 Definition of “Earthmoving Services”

As a preliminary point the CCF submits that there is a lack of precision in the definition of ‘earthmoving services’ in the Application. In a civil construction context ‘earthmoving’ typically refers to plant operations involved in excavation. For example digging a trench to lay a storm water pipe, removing overburden and clearing land for subsequent construction.

The Application specifically refers to owner/operators (described as owner/drivers in the Application) of trucks who haul/cart material either to, from or on a civil construction site. These trucks would be registered for on-road use. The Application therefore does not extend to owner/operators of any other plant or equipment.

This distinction is important as a broad interpretation of ‘earthmoving services’ may lead a reasonable person to believe that excavation and other associated civil works are also being considered. This Application is attempting to capture a small part of a relatively large market.

We believe this ambiguity has the potential to create uncertainty and will give rise to the very real possibility of the exemption being extended beyond the Application sought.

1.3 Use of Owner/Operator Services

Section 2.16 of the Application estimates that 95 percent of earthmoving / haulage services are subcontracted to owner/operators. The CCF submits that this estimate is incorrect and through its preliminary analysis estimates that on South East Queensland civil construction sites between 30 and 50 percent of truck drivers are employees of a civil construction or transport company. Furthermore, the balance of earthmoving / haulage services may be provided by a range of subcontractors that include owner drivers as well as small corporation employers and partnerships.

A typical example of how earthmoving services are utilized in a civil project is demonstrated in Appendix A.

1.4 Operational structures in civil contracting

The project variables listed in section 1.1 lead the principal contractor to utilize particular specialized equipment and people to complete a project. Some of these resources may be held internally to the contractor, others are bought in to service the needs of the particular project. The three most common operating structures of a principal contractor in a standard contractual arrangement are outlined Appendix B.

2. Engagement and Diversity of Haulage and Earthmoving Services Provided in the Civil Construction Sector

2.1 Engagement

Earthmoving services, as defined by the Application, can be considered one component or segment of the civil sector. As outlined in the diagrams in Appendix B some principal contractors have the capacity to undertake this work internally, others buy in these services either through a one on one relationship with a sub contractor (Appendix B, Diagram two), or through a more complicated network of subcontractor arrangements (Appendix B, Diagram 3).

2.2 The Diversity of Haulage Services Provided in the Civil Sector

The CCF disputes the assertion made by the CFMEU in their Application in section 2.3 that “*the services provided by owner drivers are very similar*”. The CCF submits that the earthmoving / haulage services are one of the most diverse and necessarily flexible components of the industry.

Whilst it is possible to identify standard categories of trucks as highlighted in section 2.4 of the CFMEU Application, the services provided by truck owner/operators in the civil industry are quite different.

Earlier in this submission the CCF highlighted the variety of activities undertaken across the civil sector. This includes the removal of dangerous and/or contaminated waste and other materials that require specialized haulage solutions. Owner/operators of trucks work across this spectrum of work and therefore their services are differentiated and not homogenous as is asserted in the Application.

In addition, there is a significant variance in the quality of the services provided. There are a number of key factors which influence quality in this context. These are:

- The age of the truck being used and the maintenance regime which is implemented by the owner. These factors influence both safety and reliability of the services provided. In section 2.10 of the Application it is claimed that a second hand truck could cost as little as \$10,000 while a new truck could cost several hundred thousand dollars. An owner who has purchased a newer truck will likely be providing a higher level of service all other factors being equal;
- The experience and competency of the driver - As indicated in section 2.9 of the Application there are no special qualifications or licenses required to enter the market. The operator only needs access to a truck and a truck driver's license and a standard form induction card. This leads to a wide range skills and experience within the industry and a common distinction in the industry between "drivers" and "drovers";
- The operation of the truck owners business. - As with all businesses in an industry, some have good procedures and are efficient, while others are comparatively less efficient. This influences the level of service provided by the entity and therefore creates further differentiation; and
- Insurance. The insurance coverage varies from owner to owner and influences that scope of work they can undertake. See section 2.3 '*Scope of Market*' for further details.

The only effective determinant of rates given the diversity of market and circumstances is to allow the market to freely determine the rates within the current legislative framework.

That framework is extensive including as it does the *Workplace Relations Act 1996*, the *Trade Practices Act 1974* (“ the TPA”), *Queensland Fair Trading Act 1989*, *Independent Contractors Act 2006* and unfair contracts provisions of the *Queensland Industrial Relations Act 1999*.

There cannot be a uniform formula in determining rates which would be a natural consequence of a collective bargain as this will in effect create rates that are artificial.

2.3 Scope of market

Section 2.7 of the CFMEU Application suggests that owner/drivers are quite constrained geographically and need to operate in a radius of 150km because of insurance requirements. In fact, the operating radius varies from operator to operator depending on the insurance policy that they have purchased.

The CCF accepts that some drivers may have a policy in place that limits them to a 150km radius, but considers this to be at the more restrictive end of the insurance policy market.

CCF inquiries have indicated that Insurers use this operating radius as a mechanism to control fatigue as an insurance risk. Long haul drivers can purchase additional insurance to cover this fatigue risk and widen their operating radius.

The Application admits in sections 2.9 to 2.12 that the market is currently quite a fluid and open national market. The nature of the industry enables operators to move around the country as work becomes available. In this context the CCF submits it is difficult to segment off South East Queensland as a geographic area in the context of the CFMEU Application. Operators move in and out of this geographic area frequently.

2.4 Negotiating power of owner/operators.

CCF also disputes the claim that owner drivers due to their size and skills and experience lack the ability to negotiate directly with the earthmoving contractors. This is not the experience of our members.

The following examples indicate evidence to the contrary.

(a) Regular long term arrangements:

The presence in the industry of Regular and long term arrangements between owner/drivers and particular earthmoving contractors. Such arrangements would not develop if they were not to the benefit of all parties.

(b) Bargaining over specific issues:

There is recent anecdotal evidence of owner drivers being able to negotiate successfully for an increase in rates due to fuel increases.

3. Pricing Structures

3.1 Price Structures

The variety and range of the market for earthmoving/ haulage services leads to a variety of pricing methodologies in the industry. The following are examples of existing pricing structures:

- Weight (the relative weight/density or other physical characteristic of the material being moved);
- Distance (the distance travelled by the carrier);
- Time (time on site);
- The area where work is undertaken (ie on-site, travel through metropolitan, suburban or rural areas).

As such pricing methodologies in the industry usually consider of one or a combination of the following factors:

- A flat hourly rate;
- Cubic meters moved;
- Tons moved;
- Kilometer travelled;
- Where travel has occurred (ie CBD or highway).

All of the factors noted above in this submission are important inputs in determining the market price for earthmoving services for a particular project. The CCF believes that the current market for these services is efficient and self regulating.

3.2 Determining Price

As noted by the CFMEU Application in section 2.9 to 2.12 people can and do enter and exit the market relatively easily. As with all efficient markets, when demand exceeds supply, the price rises, which in-turn encourages more operators into the market, and market equilibrium is reached. Alternatively, when overall activity in the sector reduces, the price falls and operators choose to accept the market price or exit the industry, and market equilibrium is reached.

In addition, the CCF can submit examples where owner drivers have entered into contracts with a principal or sub-contractor and have been successful in re-negotiating the price throughout the course of the contract due to unforeseen circumstances.

As stated in paragraph 2.4 the recent evidence of this were the adjustments in contracts due to the increase in fuel price.

3.3 Payment Structure

Section 2.23 of the Application indicates that owner drivers often have to wait 90 days to receive payment. This appears to be part of the rationale to conclude that owner drivers have no market power and require representation to ensure security of payment.

In Queensland owner/drivers are afforded protection of the *Building and Construction Industry Payments Act 2004*. This Act provides all contractors with a formal dispute resolution process which is designed to ensure payments are made in a timely manner. The CCF submits that this Act, which is uniformly applied across the civil construction sector in Queensland, provides the protection required to ensure security of payment.

4. Third Party Representation of the Owner Drivers and the proposed arrangement

The Application by the CFMEU for authorisation in terms of section 88 of the Act to collectively represent persons in negotiations is in our submission, an Application for legitimacy that is not otherwise available as an 'industrial' representative of the subject owner/drivers.

Further it would be providing such representation without the constraints of the existing workplace and employee relations legislative framework.

4.1 CFMEU Eligibility to enroll drivers (Trucks)

The CFMEU assert in paragraph 1.2, that the constitution of the CFMEU allows owner drivers to be members of the union.

The Registered Rules of the CFMEU at rule 2 *Constitution 2E* provide wording to the effect that the following persons are not eligible for membership:

- (a) *persons engaged in the transport of goods by road, or*
- (b) *motor truck drivers wherever employed, shall not be eligible for membership*

It is the CCF submission that the CFMEU is unable to enroll the persons subject to the Application into its membership and it is therefore not appropriate for this organisation to represent truck drivers.

The existing membership enrolment rights of the CFMEU have been determined by the Industrial Relations Commissions over a long period of time taking into account the enrolment rights of not only the CFMEU but also other organisations entitled to enroll those persons. To seek to enroll and represent these owner/drivers under the TPA is an attempt to circumvent the Union's own Rules, the Rules of other registered organisations and the constraints of the Workplace Relations Act under which the Union is registered.

This competitive behaviour by unions has been regulated in employer / employee relationships through legislation or decision by the Australian Industrial Relations Commission. These disputes between unions over representation referred to as "demarcation disputes" have involved lengthy litigation in the past.

There is also potential for competition between unions to be agent for these persons or similar classes of persons outside of the constraints of the Workplace Relations Act will lead to inflated expectations in negotiated outcomes.

Finally, the Application is unclear on whether the persons represented are sole traders, partnerships, trusts, or corporations. It may well be that the group is a mixture of these types of entities. It is submitted that in the case of partnerships, trust and corporations that these entities are not persons who could fall within the enrolment on the CFMEU.

For all of the reasons outlined above these outcomes as sought by the CFMEU would be contrary to the public interest.

4.2 Third Party Representation

The Application if successful will have the effect of providing the CFMEU with an illegitimate and improper right to represent owner drivers in a range of matters that relate to rates of pay, terms of engagement, terms of payment and safety standards, as outlined in paragraph 3.3 of the Application.

In our view it would confuse the quite clear and separate functions of the TPA and the Workplace Relations Laws. It would essentially clothe industrial matters in the fabric of the TPA.

Take for instance the example provided in paragraph 2.2 in relation to a truck of say \$10,000 in value and a \$200,000 state of the art new truck. The new truck might be specifically designed to be highly fuel efficient and provide little if no leakage of cartage material. The lesser vehicle by comparison might be a heavy fuel user and less robust in containing loads over sloping or mountainous terrain.

If the rate set for the work is the same regardless of the quality of the haulage then for the owner and operator of the new truck there will be no reward for taking the risk of a substantial investment. However, the more expensive truck will provide a better benefit for the community at large with less pollution, less greenhouse gases and safer cartage.

This would clearly be a case of market distortion brought about by the authorisation as an efficient market would reward the owner of the more expensive truck.

The outcomes sought from the negotiations also share characteristics of industrial relations outcomes. The types of matters sought in negotiations are in the main the same headings of the content of awards, workplace agreements or other industrial instruments. Effectively, the CFMEU are seeking an employee / employer relationship between the listed contractors or purchasers of haulage/cartage services and the members of the CFMEU. This treatment of a commercial relationship as an employment relationship defeats the purpose of the subcontractor arrangements and negates any benefits of a contractor relationship.

In addition CCF submits that it is not appropriate that an employee organisation be entitled to represent persons who are indisputably contractors or subcontractors. As previously discussed the areas of negotiations sought in the Application relate to wages, conditions or safety. These are employment conditions and the CFMEU by nature of its history, structure, and resources will bring about industrial relations or employee relations outcomes. It has been previously submitted that the market for earthmoving services is so diverse that a broad brush or simplified formula for payment, which is the likely result of any collective bargain particularly where the agent is focused on employment arrangements, will not be practical, economical, or in the interests of a Public benefit.

The Application in its current form may well bring about a third party in representations in any negotiations between contractor and contractor. This Application is not limited to a set of negotiations but may well extend to day to day issues such as minimum engagement, safety and particular labour components in activities. There is the potential of third party interference in ordinary relations between contractors, which will not be an efficient way to do business.

The Application if successful again will mix industrial legislation with the TPA. In this view, it will bring about union representation to employees and certain contractors on a site under the guise of the TPA. The interfacing of the subject persons and other contractors may well create different classes of contractor relations on the one site.

4.3 Current Industry Industrial Relations Environment

The building and construction industry has been subject to particular legislation (the *Building and Construction Industry Improvement Act*) and a Code of Practice that prohibits certain behaviours by individuals and third party representatives as well as a particular agency (the Office of the Australian Building and Construction Commission) to administer the legislation and applicable Codes. This legislation and agency were the result of the findings of the Cole Royal Commission in relation to inappropriate behaviour of third party representatives in the Industry.

In particular, there is the potential to use authorisations obtained under the TPA to create occupational health and safety, right of entry and employment issues without the constraints of the legislation that apply to these matters.

This practical impact of any ACCC authorisation must be critically considered in any Application for the extension of representation rights by the CFMEU and any other representative third party in the industry. In light of these recent developments in the Building and Construction Industry, and the improvement in industrial relation outcomes, it is submitted that the public interest may not be served to by extending an employee organisation's representation in this industry.

4.4 Collective Bargaining

The outcome of collective bargaining negotiations for the subject drivers will have the characteristics of a 'pattern bargaining' agreement in that there is likely to be standard minimums at least in terms of the labour cost component in any contract and minimum engagements. Pattern bargaining for employees is prohibited in terms of the *Workplace Relations Act 1996*, however this Application, if successful, will bring about a 'pattern bargaining' outcome for contractors.

The authorisation of the CFMEU as an agent to collectively bargain will have the effect of legitimising the outcome of any negotiations with industry contractors whether voluntary or not. This perceived legitimacy of the outcome will strongly influence the outcomes and rates sought by other contractors. In other words, the legitimising of CFMEU negotiations will provide a floor price for these types of services.

Thus the natural operation of the market will be distorted through the use of authorisation processes under the TPA.

4.5 Inappropriate nature of the class of persons for authorisation given size of the industry.

Finally, the CCF submits that an Application to cover a small number of owner drivers (24), for protected collective bargaining in terms of the *Trade Practices Act 1974* is inappropriate given the size of the industry.

CCF estimates that the subject owner drivers are a very small minority of the number of owner drivers available. This small number could not be considered representative of owner drivers in the industry. Furthermore, the 17 listed users of the services in Application are not, from CCF research, the largest users or the majority of the earthmoving companies or representative of a particular class of entity.

It is the conservative estimate of CCF that the Earthmoving /haulage service sector has hundreds of entities in South East Queensland. Therefore, the Application affects a very small number of individuals that are not representative of the industry nor indeed the majority of the industry. The granting of an authorisation in these circumstances would have an influence on other transactions within the industry and extend well beyond the 24 individuals and affect price movement through-out the industry. In balancing the public interest the detriment to the whole of the industry must surely outweigh any perceived benefit of 24 individual operators.

5. No Net Public Benefit

The CCF submits that there will be no net public benefit from the proposed collective bargaining. The CCF strongly submits that an authorisation has serious potential to result in a lessening of competition and ultimately an increase in price to consumers or in these case taxpayers/ratepayers.

5.1 Diversity of projects requires varied and flexible contractual arrangements

This submission demonstrates that there is not one market for “earthmoving services” but rather a number of varied and different submarkets.

Each particular project or job has its own specific characteristics. A consequence of allowing the collective bargaining arrangements would be the setting of a floor price, or benchmark which would not take into account the individual specifications of a particular job. An operator who has 10 years experience in a particular type of cartage would be rewarded the same as an operator who has little or no experience.

The standardisation of contracts under the proposed arrangements would reduce the use of “tailored” contracts and may also result in the use of less efficient or environmentally suitable practices. It would remove an incentive to be innovative or for owner drivers to invest in the very latest equipment. All of which are to the public detriment. The costing formula will need to vary project to project.

Additionally, the industry is moving towards using forms of contracting such as alliance contracting. Alliance contracting is based on a “share the pain, share the gain” arrangement throughout the supply chain. Critically it requires at its heart flexibility so that those in the contract process can respond with innovative solutions to issues such as managing stakeholder concerns, heritage sites and other intangible but critical issues.

5.2 Reduction in competition

The granting of an authorisation for the CFMEU to negotiate on behalf of a small number of owner drivers will have the affect of creating a standardised rate. This rate will have a perceived legitimacy because of ACCC authorisation.

The CFMEU is in the market of enrolling members and any improved rate will be promoted within this industry as a benefit of joining the CFMEU which as has been pointed out is a perverse outcome as it is contrary to the Union's own rules and Workplace Relations legislation.

The influence of a collective negotiated rate can not be discounted in any consideration of this Application. Any outcome of a collective negotiation will act as a bench mark and will reduce competition for the best price.

5.3 Collective bargaining and efficient business viability

CCF rejects the claims made about "efficient business viability". The viability of civil construction is due to a range of factors such as finance especially in the current environment.

The factors that impact on civil construction are complex and interrelated. They include:

- Lack of national uniformity and harmonization across states, territories, state agencies and local government in a range of areas such as procurement and tendering, prequalification and contract standardization, licensing and regulation;

- Lack of National and state/local government integrated forward programs and planning which impact on the ability of the industry to plan, invest and train;
- The need to address the skills shortages in civil construction through specific measures to better capture data on skills shortages and support the undertaking of targeted training and development ;and
- The important of workplace harmony and lack of industrial disputation.

The lack of collective bargaining will not alter, improve or indeed make any difference to these concerns.

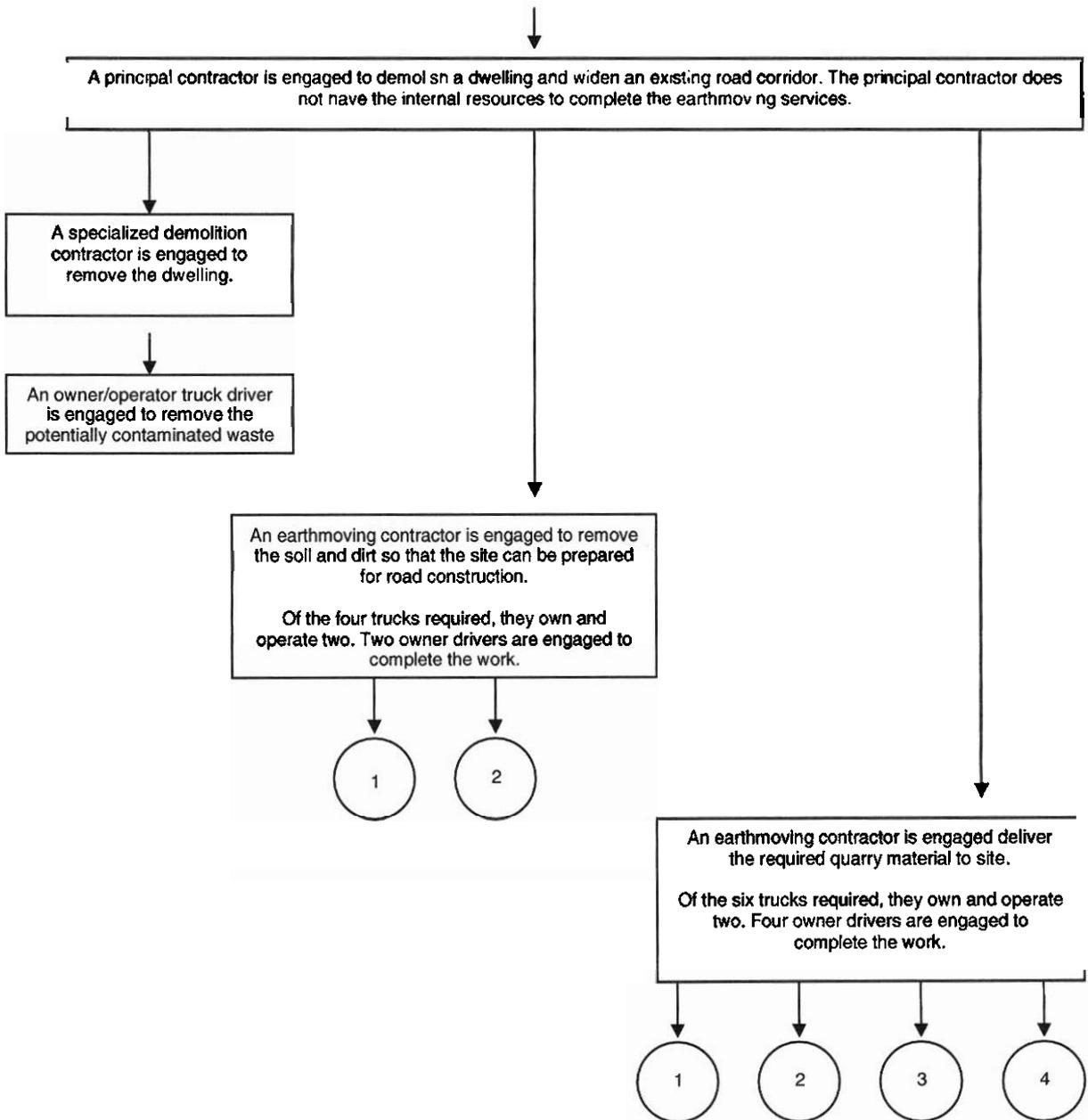
6 Further submissions

CCF specifically reserves its rights to make further submissions in respect of section 3 of the Application and in particular the particular items which are sought for inclusion in the bargaining outlined in section 3.3.

The CCF would also welcome the opportunity to either expand upon or make further submissions if required.

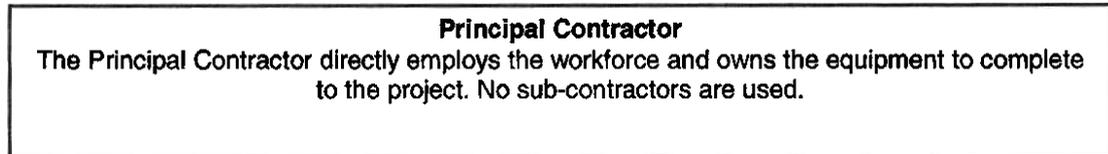
Appendix A

Project A: Widen an existing road corridor including demolition of a dwelling

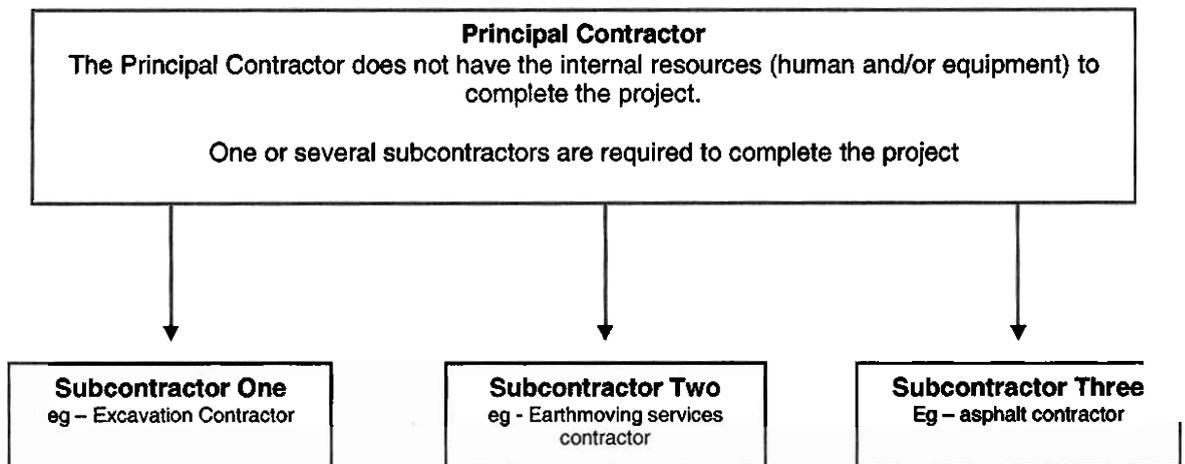


Appendix B

Operating Structure 1



Operating Structure 2



Operating Structure 3

