# Instructions for Public Construction Procurement in Victoria

These Instructions are issued by the Secretary of the Department supporting the Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**.

These Instructions together with the **Ministerial Directions for Public Construction Procurement in Victoria** (Directions) comprise the mandatory requirements for Victorian public construction. These Instructions and the Directions should be read and interpreted together. The Instructions and Directions are supported by non-mandatory guidance.

Capitalised terms used in these Instructions have the meaning given to them in the Directions.

The Secretary may authorise in writing any person to:

* perform any duties held by the Secretary under these Instructions; or
* grant any approvals available to the Secretary under these Instructions.

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|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | Introduction | New paragraph inserted to clarify how the Secretary may delegate authority under these Instructions. | DTF |



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# Exemptions

**Public Construction – Instruction 1.4
Effective date 1 July 2018**

**Objective:** To define requirements for Agencies in applying for exemptions from the Directions

**Relevant Direction: 1**.4 Exemptions

The Accountable Officer of the Agency seeking an exemption must:

ensure that an application for an exemption under Direction 1.4:

is in writing;

states the reasons why the exemption is necessary;

specifies the proposed alternative action or procedures that will be adopted by the Agency; and

explains how the alternative action or procedures will ensure that Public Construction Procurement is undertaken in a manner that is consistent with the principles set out in Direction 1.2;

ensure that the proposed alternative action or procedures are not implemented until after an exemption is provided, to the extent that the action would otherwise conflict with these Directions and Instructions or require unnecessary duplication;

ensure that the Agency complies with the conditions of any exemption provided under Direction 1.4; and

maintain a record of applications for exemptions requested by their Agency under Direction 1.4, including whether or not the exemption was granted and any conditions upon which the exemptions were granted, and must make a record available for inspection by the Auditor-General.

# Complying with International Agreements

**Public Construction – Instruction 2.1
Effective date 1 July 2018**

**Objective:** To define requirements for Agencies to understand obligations under International Agreements

**Relevant Direction:** 2.1 International Agreements

## 2.1.1 When International Agreements apply

Subject to paragraph 2.1.2, the requirements of International Agreements apply to the Agencies listed in Attachment 1 to this Instruction 2.1 if:

the Agency is acquiring or obtaining Works or Construction Services, by any procurement delivery method; and

the expected value of the goods or services being procured is estimated, as at the date of issue of the Tender Notice, to exceed:

in the case of Works, $9,247,000 (inclusive of GST); and

in the case of any other goods or services, including Construction Services, $657,000 (inclusive of GST).

For the purposes of this Instruction, to determine the 'expected value' of the goods or services, Agencies must:

consider the maximum value (inclusive of GST) of the proposed contract, including any options, extensions, renewals or other mechanisms that may be executed over the life of the contract;

include the following amounts:

all forms of remuneration, including any premiums, fees, commission, interest, allowances and other revenue streams provided for in the proposed contract;

the value of the goods or services being procured, including the value of any options in the proposed contract to include additional goods or services or extend the term of the agreement; and

any taxes or charges;

not divide the procurement of goods or services into separate parts solely for the purpose of avoiding the thresholds set out in this Instruction; and

where it is not possible to determine the amounts payable over the entire duration of the proposed contract, treat the expected value as being above the relevant thresholds set out in this Instruction.

## 2.1.2 When International Agreements do not apply

The requirements of International Agreements do not apply:

if the Agency is acquiring or obtaining the Works or Construction Services:

on behalf of an Agency that is not listed in Attachment 1 to Instruction 2.1, or any government entity of the Commonwealth or another state or territory of Australia that is not a 'covered entity' for the purposes of an applicable International Agreement, or of local government;

from another government entity, including another Agency, any government entity of the Commonwealth, another state or territory of Australia, or local government;

with funds received from grants or sponsorship payments from a person other than an Agency listed in Attachment 1 to Instruction 2.1, or any other person, including any government entity of the Commonwealth or another state or territory of Australia that is not a 'covered entity' for the purposes of an applicable International Agreement, or local government;

with funds received from international grants, loans or other assistance, when the provision of such assistance is subject to conditions inconsistent with the requirements in Attachment 2 of Instruction 2.1; and

where those Works or Construction Services constitute research and development services, but not to the inputs to research and development undertaken by an Agency;

to the extent reasonably necessary to:

protect public morals, order or safety;

protect human, animal or plant life or health (including by environmental measures); or

to protect intellectual property;

to a reasonable extent relating to the goods or services of persons with disabilities, philanthropic or not-for-profit institutions, or of prison labour;

to the extent that small and medium businesses are given preference;

to the extent that action is taken to protect national treasures of artistic, historic or archaeological value;

to the extent that action is taken for the health and welfare of indigenous people; or

to the extent that action is taken for the economic and social advancement of indigenous people.

For the purposes of this Instruction 2.1.2, to determine whether or not a government entity of the Commonwealth or another state or territory is a 'covered entity', Agencies will need to refer to the Schedules of relevant International Agreements.

## 2.1.3 Requirements of International Agreements

Where International Agreements apply, Agencies must follow the requirements of Attachment 2 to Instruction 2.1.

***Attachment 1 to Instruction 2.1 Agencies that must comply with government procurement requirements under International Agreements***

***Attachment 2 to Instruction 2.1 Government procurement requirements under International Agreements***

# Complying with the Australia New Zealand Government Procurement Agreement

**Public Construction – Instruction 2.2
Effective date 1 July 2018**

**Objective:** To define requirements for Agencies to understand obligations under the Australia New Zealand Government Procurement Agreement

**Relevant Direction:** 2 International Agreements

## 2.2.1 When the Australia New Zealand Government Procurement Agreement applies

All Agencies must apply the provisions of the Australia New Zealand Government Procurement Agreement.

Subject to paragraph 2.2.2, the requirements of the Australia New Zealand Government Procurement Agreement apply to all procurement activity.

## 2.2.2 When the Australia New Zealand Government Procurement Agreement does not apply

The following classes of procurement are exempt from the Agreement:

procurement conducted by Government bodies that trade in substantial competition with the private sector and would be placed at a significant commercial disadvantage if they were required to fully comply with all provisions of the Agreement;

joint ventures with the private sector;

internal procurement of goods and services by a government from its own Departments or public bodies is exempt from all provisions of the Agreement where no other supplier has been asked to tender. If, however, public tenders are called for goods or services, Works or Construction Services, the provisions of the Agreement apply irrespective of whether a government body submits a tender;

where procurement specifications include proprietary items to ensure machinery or equipment integrity, the procurement specification is exempt from the provisions of paragraph 2.2.3 (b). Where such items are available from a number of sources or public tenders are called, all aspects of the procurement other than the specification are subject to the provisions of the Agreement;

the urgent procurement of goods and services in the event of emergencies, such as natural disasters, periods of national security or UN peacekeeping operations;

procurement of proprietary equipment of a work, health or safety nature specified in Industrial Agreements is exempt from the provisions of paragraph 2.2.3 (b) of this Instruction, only as they may relate to biased specifications;

procurement supporting measures necessary to protect human, animal or plant life or health, including the protection of indigenous or endangered animal or plant life. Each country may impose quarantine requirements on imports, but such requirements must not be used as a means of arbitrary or unjustified discrimination, or a disguised restriction on trade; and

procurement supporting measures in relation to the goods or services of persons with a disability, or of philanthropic or not-for-profit institutions.

## 2.2.3 Requirements of the Australia New Zealand Government Procurement Agreement

Subject to Instruction 2.2.2, the Australia New Zealand Government Procurement Agreement requires the following principles to be applied:

purchasing bodies must treat all of Australia and New Zealand as a single market;

no discrimination based on the origin of goods and services within that market;

Australia and New Zealand tender participants must be able to compete on an ‘equal and transparent basis’;

unsuccessful Australia and New Zealand tender participants are entitled to a debrief upon request; and

value for money based on a whole of life costing must be the fundamental determinant of tender outcomes.

# Tender preparation and planning

**Public Construction – Instruction 3.1
Effective date 1 July 2018**

**Objective:** To define requirements for Agencies in undertaking tender planning

**Relevant Direction:** 3.1 Tender preparation and planning

## 3.1.1 Requirements for tender planning

**(a**) Tender Strategy

The tender strategy must document the:

project staging and structuring;

scope of works being tendered;

tender approach; and

form of invitation to tender.

(b) Key dates and time periods during the tender process

Key dates and time periods that should be documented as part of the tender planning include the:

time period for developing Tender Documentation, including site information, specifications, contract documents, and the tender evaluation plan;

dates for releasing of notices and Tender Documentation to the market;

time period for tender participants to submit a response;

evaluation period; and

time to obtain relevant approvals both internally and from other Agencies.

## 3.1.2 Adherence to key dates and time periods

While tender planning and the timing of procurements need to respond to changing circumstances, once a Tender Notice has been issued, Agencies should endeavour to adhere to the time periods communicated to tender participants (and potential participants), in particular tender open periods and evaluation periods.

# Competition and contestability

**Public Construction – Instruction 3.2
Effective date 30 December 2018**

**Objective:** To define the responsibilities of Agencies to ensure appropriate/efficient levels of competition

**Relevant Direction:** 3.2 Competition and contestability

2.1 Complying with International Agreements

## 3.2.1 Limited Tender processes

Agencies may use a Limited Tender if:

the value of the engagement is expected to be less than $50,000 (inclusive of GST), in which case the Agency may invite a single potential tender participant to participate in the Limited Tender;

the value of the engagement is expected to be:

in the case of Works, more than $50,000 (inclusive of GST) but less than $500,000 (inclusive of GST); or

in the case of Construction Services, more than $50,000 (inclusive of GST) but less than $200,000 (inclusive of GST),

in which case the Agency must invite at least three potential tender participants to participate in the Limited Tender;

the Special Circumstances set out in Instruction 3.2.2 apply, in which case the Agency must comply with the requirements in paragraph (b); or

procuring under a Supplier Panel established in accordance with the Directions, as the rules of that panel allow.

Where a Limited Tender is conducted in accordance with paragraph (a)(iii), the Agency must:

determine the most appropriate way to conduct the Limited Tender taking into account the nature of the Special Circumstances and, to the extent practicable, identify ways to conduct the Limited Tender in a manner that is consistent with the principles set out in Direction 1.2, and otherwise in accordance with the requirements of the Directions;

document the nature of the Special Circumstances and proposed approach to conducting the Limited Tender; and

ensure the Accountable Officer or Responsible Minister of the Agency approves the use of a Limited Tender and the proposed approach to conducting the Limited Tender.

To avoid doubt, paragraph (b) does not apply to Limited Tenders conducted in accordance with paragraphs (i) and (ii) of paragraph (a).

The thresholds set out in paragraph (i) and (ii) of this Instruction 3.2.1(a) are to be reviewed, taking account of the advice of the Public Construction Procurement Committee, at least every five years and may also be reviewed at such other times as the Committee may recommend.

An Agency may procure Works or Construction Services from a group purchasing scheme only if the procurement and contracting processes used by the group purchasing comply with these Ministerial Directions and Instructions.

## 3.2.2 Special Circumstances

The Special Circumstances when Agencies may conduct a Limited Tender are:

due to reasons of extreme urgency brought about by events unforeseeable by the Agency, or because the Works or Construction Services could not be obtained in time by means of an open tender or Selective Tender. Such reasons may include:

life threatening situations;

occupational health and safety;

security;

loss of essential services;

avoiding significant loss or damage to assets, or significant service delivery disruption;

weather protection; or

any comparable events beyond the control of the Agency;

but not where the urgency arises because performance of the Works or provision of the Construction Services is simply running over time;

to protect essential security interests;

where, in response to an open tender or Selective Tender:

no tenders were submitted;

no tender that represented a value-for-money outcome was received;

no tenders were submitted that conform to the essential requirements in the Tender Documentation; or

no tender participants satisfied the conditions for participation;

provided that, in the Tender Documentation for the Limited Tender, the Agency does not substantially modify the essential requirements set out in the original Tender Documentation;

only single or a limited number of potential tender participants could perform the Works or provide the Construction Services for any of the following reasons:

the requirement is for a work of art;

to protect patents, copyrights or other exclusive rights or proprietary information; or

due to an absence of competition for technical reasons;

to perform additional Works or provide of Construction Services by the original supplier not included in the initial procurement where changing supplier would require the Agency to procure Works or Construction Services that do not meet the requirements of interchangeability or interoperability with the existing equipment, Works or Construction Services;

to perform additional Works or provide additional Construction Services that are an extension of Works or Construction Services not included in an existing contract, but that are within the objectives of the original Tender Documentation;

the Works are to be carried out in, or Construction Services are related to, leased premises or a third-party property where:

the supplier must be approved by the lessor, or another third party; or

the costs of the approved Works or Construction Services are to be reimbursed to the lessor in accordance with the leasing arrangements, or another third party in accordance with the arrangements for the third-party property;

the supplier of the Works or Construction Services is selected as a result of a design competition;

where the procurement is conducted in accordance with the Market-Led Proposals Guideline;

exceptional circumstances as certified by the Responsible Minister or Accountable Officer; or

the Works comprise a utility asset being installed by a third party and the Agency requests increased scope or changes to the specification for the utility asset.

When the provisions of International Agreements apply to a Limited Tender, Special Circumstances 3.2.2 (g) and 3.2.2 (j) are not allowed.

## 3.2.3 Multi-stage procurement processes

(a) Agencies may use multi-stage procurement processes when conducting open or Selective Tenders.

(b) When conducting a multi-stage procurement process for a Selective Tender, the initial invitation stage may be either open or selective.

(c) For clarity, the requirement to use a forward notice set out in Instruction 5.1 applies to multi-stage tender processes. The forward notice must be used in advance of the first notice that starts the multi-stage tender process.

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|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 3.2.1 | New sub-paragraph (d) inserted to describe the conditions when a procurement may be made through a group purchasing scheme. | DTF |
| 1 | 30/12/2018 | 3.2.2 | New sub-paragraph (k) inserted to provide an additional special circumstance that may justify use of a Limited Tender - the Works comprise a utility asset being installed by a third party and the Agency requests increased scope or changes to the specification for the utility asset. | DTF |
| 1 | 30/12/2018 | 3.2.3 | New paragraph 3.2.3 added to describe use of multi-stage procurement processes. | DTF |

# Promoting efficiency in the tender process

**Public Construction – Instruction 3.3
Effective date 1 July 2018**

**Objective:** To help Agencies to promote efficiency and reducing the burden of the tender process

**Relevant Direction:** 3.3 Promoting efficiency in the tender process

3.2 Competition and contestability

## 3.3.1 Do not request unnecessary information

Agencies should not request unnecessary information from tender participants. In particular, Agencies should be mindful of the time and cost to tender participants of preparing project-specific plans and documents. Agencies should limit the information requested to what is necessary for the evaluation at that stage of the procurement process.

For large or complex projects, Agencies should consider using two-stage processes so that only short-listed tender participants are required to prepare project-specific documentation.

Agencies should consider whether preparing project-specific plans and documents, such as project-specific environmental management plans, can be limited to the successful tender participant rather than requested from all tender participants where such plans and documents are not critical to the evaluation criteria and project program.

When conducting a tender process using a Register, Agencies must, to the extent practicable, make use of information provided during the prequalification process for the Register to reduce the amount of information that prequalified tenders are required to provide during the tender process.

## 3.3.2 Establish cost estimates

Agencies should establish cost estimates before releasing a tender. This might mean engaging a professional cost adviser.

Agencies should avoid asking tender participants to price multiple, mutually exclusive options in a tender process. Where this is unavoidable or design alternatives are required, Agencies should select an appropriate procurement strategy and project delivery method.

## 3.3.3 Have a firm intention to proceed before issuing the tender

Agencies must ensure there is a firm intention to proceed with the Works or Construction Services before beginning a tender process.

If funding is yet to be confirmed for any part of the Works or Construction Services, this should be clearly identified to potential tender participants and contractual arrangements for the Works or Construction Services should be structured appropriately.

# Tender Notices

**Public Construction – Instruction 3.4
Effective date 2 August 2019**

**Objective:** To outline the requirements for providing tender notice to promote awareness in the market of available government procurement opportunities

**Relevant Direction:** 3.4 Tender Notices

## 3.4.1 Tender Notice of commencing procurement

Tender Notices must give all potential participants in the tender process effective notice that it has begun, being:

for an open tender, all potential tender participants, and

for a Selective Tender or a Limited Tender, each potential tender participant invited to participate in the tender process.

## 3.4.2 Tender Notices – format and content

For open tenders, in addition to any other means of publication, Tender Notices must be published on the website or system nominated by the Secretary using the applicable form.

For Selective Tenders and Limited Tenders, in addition to any other means of communication, a Tender Notice must be sent to each potential tender participant invited to participate in the tender process from the website or system nominated by the Secretary where the expected value of the Selective Tender or Limited Tender is greater than:

(a) for Works – the upper limit stated in Instruction 3.2.1(a)(ii)(1); or

(b) for Construction Services - the upper limit stated in Instruction 3.2.1(a)(ii)(2).

If Tender Documentation is not included in the Tender Notice, then the Tender Notice must provide details about how to obtain access to the Tender Documentation.

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|  |  1/07/2018 |  | First release |  |
| 1 |  2/8/2019 | 3.4.2 | Insert new paragraph describing tender notice requirements for Selective Tenders and Limited Tenders. Notices for Selective Tenders and Limited Tenders with a value greater than the upper limit stated in Instruction 3.2.1(a)(ii)(1) or (2) need to be published on the website or system nominated by the Secretary. | DTF |

# Tender Documentation

**Public Construction – Instruction 3.6
Effective date 1 July 2018**

**Objective:** To outline the requirements for information to be included in Tender Documentation

**Relevant Direction:** 3.6 Tender Documentation

7.1 Contracting requirements

## 3.6.1 Form of tender documents

Agencies must use model Tender Documentation designed for use with a Victorian Public Construction Contract where appropriate.

## 3.6.2 Terms and conditions to be set out in Tender Documentation

Agencies must include the following information in Tender Documentation, as appropriate for the relevant stage of the tender process:

the Agency's project objectives;

appropriate detail of the Works or Construction Services the Agency is seeking, including the statement of requirements or design specification (as applicable);

the terms and conditions applicable to the tender process, including:

evaluation criteria applicable to the relevant stage of the tender process, with any mandatory criteria identified;

the tender closing date and time;

the place and process for lodging tenders;

how the Agency will handle late tenders;

whether or not the tender process will include briefings, interviews, negotiations, or provide for a best and final offer process; and

how the Agency will handle alternative or non-conforming tenders;

details of the documentation and responses that tender participants are expected to submit;

the terms on which the successful supplier will be engaged to perform the Works or Construction Services, including, at the relevant stage of the tender process, the form of contract; and

information about relevant government policies that apply to the procurement for example, the Victorian Industry Participation Policy.

## 3.6.3 Avoid issuing late and multiple addenda

Agencies should avoid making changes to the Tender Documentation during the tender process. In cases where changes are unavoidable, Agencies should ensure that:

tender participants have a reasonable time frame to consider the changes and make any necessary adjustments to their submissions; and

any adjustment is consistent with the probity principle set out in Direction 1.2 and the probity requirements set out in Direction 4.1, particularly Direction 4.1(b).

Where changes arise close to the tender closing time, it may be appropriate to extend the closing time to ensure tender participants have time to adjust their responses.

# Evaluation criteria

**Public Construction – Instruction 3.7
Effective date 30 December 2018**

**Objective:** To define the requirements of advising the market of evaluation criteria for the tender and help agencies in establishing criteria

**Relevant Direction:** 3.7 Evaluation criteria

## 3.7.1 Evaluation plan

The evaluation plan must set out the:

tender evaluation criteria, including identifying of any mandatory criteria;

relative importance and associated weightings of the evaluation criteria;

evaluation methodology and how each criteria will be evaluated; and

tender evaluation process, including:

who will assess the tenders;

resourcing, such as technical experts required to assess certain criteria;

which evaluation committee members will have access to what information, and

how each evaluation criteria will be assessed and scored.

## 3.7.2 Disclosure of evaluation criteria

In addition to disclosing the evaluation criteria in the Tender Documentation and indicating any mandatory evaluation criteria, Agencies may, but are not required to provide tender participants with:

guidance about the evaluation criteria for the purpose of encouraging responsive tenders; and

an indication of the relative importance or weighting of the evaluation criteria in Tender Documentation.

## 3.7.3 Mandatory evaluation criteria

Evaluation criteria used by Agencies must include the following mandatory evaluation criteria:

value for money, which must be the primary determinant of the procurement outcome, after taking into account all of the individual evaluation criteria including price;

the occupational health and safety management criteria set out in Attachment 1 to this Instruction 3.7, where:

in the case of Works, the value of the Works exceeds $500,000 (inclusive of GST); and

in the case of Construction Services, the value of the Construction Services exceeds $200,000 (inclusive of GST);

the industrial relations management criteria set out in Attachment 2 to this Instruction 3.7, where the procurement includes supply of Works and the value of the Works (or Works component) exceeds $500,000 (inclusive of GST); and

appropriate criteria to enable consideration of each tender participant's past performance in delivering Works or Construction Services whether for Agencies within the Victorian Government, other governments or non-government organisations.

In the case of the mandatory criteria referred to in paragraphs (b) and (c), Agencies must ensure that a tender participant satisfies the criteria before awarding a contract to perform Works or Construction Services.

Where a tender participant has already been assessed against the mandatory criteria as part of a prequalification process, whether as part of qualification or requalification to a Register, becoming a member of a Supplier Panel or through an expression of interest process, then the Agency does not need to reassess the tender participant against the criteria provided they confirm, prior to contract award, that:

in the case of a tender participant prequalified on a Register or a member of a Supplier Panel, the tender participant remains on that Register or Supplier Panel; and

in all cases, there has been no material change to the information submitted to satisfy the criteria (whether at the time of prequalification or requalification, or during the expression of interest process) whether positive or negative, that would affect the tender participant's ability to satisfy the criteria.

## 3.7.5 Approved assurance systems

The Secretary may approve assurance systems that may be cited by suppliers of Works or Construction Services as evidence of complying with the mandatory evaluation criteria listed in Instruction 3.7.3 (b) and (c).

Approved assurance systems may be cited by suppliers of Works or Construction Services as evidence of complying with the mandatory evaluation criteria listed in Instruction 3.7.3 (b) and (c).

For the occupational health and safety management criteria set out in Attachment 2 to Instruction 3.7, the approved assurance systems are:

‘SafetyMap’;

AS 4801 2001: OHS Management Systems;

Civil Contractors Federation Management Code;

Australian Government Building and Construction WHS Accreditation Scheme; and

 ISO 45001 2008 Occupational health and safety management systems

Note that assessment using the above approved assurance systems will address the mandatory occupational health and safety management criteria numbered 1 – 10 for suppliers of Works or Construction Services set out in Attachment 1 to Instruction 3.7, but current information will always be required regarding the criteria numbered 11 and 12 set out in Attachment 1 of Instruction 3.7.

***Attachment 1 to Instruction 3.7 Mandatory evaluation criteria for occupational health and safety management***

***Attachment 2 to Instruction 3.7 Mandatory evaluation criteria for industrial relations management***

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|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 3.7.5 | New sub-paragraph (e) inserted to add ISO 45001 2008 as an approved assurance system for occupational health and safety management criteria. | DTF |

# Probity requirements

**Public Construction – Instruction 4.1
Effective date 1 July 2018**

**Objective:** To define probity requirements

**Relevant Direction:** 4.1 Probity requirements

## 4.1.1 Apply Public Sector Values

When conducting Public Construction Procurement Agencies must apply Public Sector Values and make informed decisions based on merit.

## 4.1.2 Treat tender participants fairly and equally

When conducting Public Construction Procurement Agencies must treat all tender participants and potential tender participants fairly and equally:

Endeavour to provide all tender participants and potential tender participants in a tender process with access to the same information and ensure that they are all promptly informed of any new information relevant to the tender process that is provided to any other tender participant (or potential tender participant).

Establish a clear process for receiving and responding to questions and clarifications.

Ensure fair and reasonable access to the data room or similar facility (if any).

Ensure fair and reasonable allocation of site visits (if any).

## 4.1.3 Maintain confidentiality of tender participants' confidential information

When conducting Public Construction Procurement Agencies must maintain confidentiality of each tender participant’s confidential information, including commercially sensitive information and intellectual property. This includes when providing additional information to tender participants in response to a question or a clarification.

## 4.1.4 Auditable, transparent and accountable tender and contract management processes

When conducting Public Construction Procurement, Agencies must ensure tender and contract management processes are auditable, transparent and accountable by creating and maintaining appropriate records, including:

all documents issued to tender participants and potential tender participants in the tender process;

all communications with tender participants and potential tender participants in the tender process;

records of access to the data room (if any);

records of site visits (if any);

tenders received;

the evaluation plan and the evaluation process;

records of post-tender negotiations;

records of actions taken to address any real, potential or perceived conflicts of interest;

the contract and contract documents; and

documents issued pursuant to the contract, including variations, formal notices, performance security given and received by the Agency (as applicable), certificates and supplier performance reports.

## 4.1.5 Commitment from tender participants

When conducting Public Construction Procurement Agencies must obtain a commitment from each tender participant, as a condition of participating in the process, that the tender participant:

must immediately declare any conflict of interest (actual, potential or perceived) to the Agency, upon becoming aware of the conflict;

must conduct themselves fairly and honestly;

must not engage in any practice that would defeat the purpose of a fair and transparent selection process, including engaging in collusive tendering or any other anti-competitive practices such as, but not limited to:

an agreement between tender participants about who should be the successful tender participant;

any meeting of tender participants to discuss tenders before the submission of the tenders if the Agency inviting tenders is not present;

an exchange of information between tender participants about their tenders before awarding of a contract or a commission;

an agreement or exchange of information between tender participants for the payment of money or securing of reward or benefit for unsuccessful tender participants by the successful tender participant;

agreements between tender participants to fix the prices or conditions of a contract (this means any collaboration between tender participants of prices or conditions to be included in contracts or commissions without the consent of the Agency);

a submission of a cover tender or to provide any assistance to any tender participant to submit a cover tender (that is, a tender submitted as genuine but which has been deliberately priced in order not to win the contract or commission);

any agreement between tender participants prior to submission of tenders to fix the rate of payment of employer or industry association fees where the payment of such fees is conditional upon the tender participant being awarded the contract or commission; and

payment to any third party of money, fees, incentives or other concessions contingent on the success of the tender that do not relate to the provision of proper services relevant to the tender.

must not:

accept or provide any secret commissions;

enter into any improper commercial arrangements with other contractors, subcontractors, suppliers, agents or parties;

seek to influence contract decisions by improper means during the tender process; or

accept incentives to provide contracts or services to other contractors, subcontractors or suppliers that financially disadvantage the Agency.

# Managing probity in Public Construction Procurement

**Public Construction – Instruction 4.2
Effective date 1 July 2018**

**Objective:** To define the requirements for probity plans and when to involve probity practitioners

**Relevant Direction:** 4.2 Managing probity in Public Construction Procurement

## 4.2.1 Systems and processes to manage probity

Agencies must have appropriate systems and processes in place to manage probity in Works or Construction Services, to ensure they are able to conduct the procurement in line with the principles in Direction 4.1.

## 4.2.2 Probity plan

In addition to the general systems and processes required to manage probity in the procurement of Works or Construction Services, the Agency undertaking the procurement must prepare a probity plan before beginning a tender process if the Works or Construction Services being procured are:

likely to exceed $10 million (inclusive of GST); or

complex or otherwise high risk.

The probity plan must address:

probity responsibilities;

probity risks and related management strategies;

probity services to be provided by internal or external advisers to support the procurement, which may include engaging a probity practitioner where the complexity of the procurement warrants independent process oversight;

applicable legal obligations, procurement rules and policies; and

processes for managing communications, security and confidentiality during the tender process.

# Forward notices

**Public Construction – Instruction 5.1
Effective date 30 December 2018**

**Objective:** To promote awareness in the market of upcoming government procurement opportunities

**Relevant Direction:** 5.1 Forward notices

## 5.1.1 Publishing forward notices for an upcoming procurement

Agencies must provide an appropriate period of forward notice of upcoming procurements, taking account of:

the nature and complexity of the Works or Construction Services;

the likely tender participants and market characteristics, including whether it will be necessary for participants to establish consortia or likely interest from international tender participants; and

the tender strategy and Procurement Model.

## 5.1.2 Forward notices – format and content

Subject to Instruction 5.1.3, in addition to any other means of publication or provision of notice to potential tender participants, forward notices must be published on the website or system nominated by the Secretary using the applicable form, and include the following information, to the extent known at the time of publication:

indication of the expected timing and location for release of the Tender Notice;

general nature of the Works or Construction Services to be procured, including the reference code used in the applicable form;

location where the Works or Construction Services are to be delivered;

the Procurement Model;

indication of the likely tender process to be used, including whether:

the tender process will be conducted as an open or a Selective Tender;

a single- or multi-stage tender process will be used, and

in the case of a Selective Tender, the type of Selective Tender that will be conducted;

any minimum certification requirements or technical capability requirements, including in the case of a Selective Tender, the relevant prequalification category or categories;

government policies applicable to the procurement, such as the Victorian Industry Participation Policy; and

the Agency contact information.

Publication of a forward notice on website or system nominated by the Secretary is encouraged, but not required, for Limited Tenders, where appropriate given the grounds for conducting a Limited Tender.

## 5.1.3 Forward notices – when to use

A forward notice must be used for open tenders.

A forward notice must be used for Selective Tenders where the expected value of the Selective Tender is greater than:

for Works - the upper limit value stated in Instruction 3.2.1(a)(ii)(1.); or

.for Construction Services - the upper limit value stated in Instruction 3.2.1(a)(ii)(2.).

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 5.1.2 | The words ‘Subject to Instruction 5.1.3,’ added at the start of the first paragraph.The words ‘for open and Selective Tenders’ removed from the second line.New paragraph 5.1.3 addresses when to use forward notices. | DTF |
| 1 | 30/12/2018 | 5.1.3 | New paragraph 5.1.3 inserted to clarify when forward notices are used with open and Selective Tenders. Establishes minimum threshold values above which forward notices are required. | DTF |

# Publishing details of procurements undertaken

**Public Construction – Instruction 5.2
Effective date 1 July 2018**

**Objective:** To promote awareness of the outcomes of procurement processes

**Relevant Direction:** 5.2 Publishing details of procurement undertaken

## 5.2.1 Disclose details of contracts

Within 60 days after the award of a contract, Agencies must publish on the website or system nominated by the Secretary:

the key details of contracts for Works or Construction Services with a total estimated value equal to or exceeding $100,000 (inclusive of GST) whether procured through an open tender, Selective Tender or Limited Tender; and

full contract information for contracts for Works or Construction Services with an estimated value exceeding $10 million (inclusive of GST) under Financial Reporting Directive 12B.

## 5.2.2 Contracts subject to disclosure

Disclosure relates to all contracts for Works or Construction Services valued above the foregoing amounts, including:

agreements for procurements of Works or Construction Services;

head agreements such as standing offer arrangements or agreements establishing a Supplier Panel;

agreements entered into under head agreements such as engagements under standing offer arrangements or a Supplier Panel to perform Works or Construction Services;

agreements entered into with suppliers from a Register; and

agreements to vary any of the foregoing.

Disclosure is not required where the contract was awarded following a Limited Tender process conducted due to the existence of the Special Circumstances set out in Instruction 3.2.2 'for protection of essential security interests’.

Disclose contract information in the manner described in Attachment 1 to Instruction 5.2.

***Attachment 1 to Instruction 5.2 Disclosure of contracts and variations to contracts***

# Use of Registers and Supplier Panels

**Public Construction – Instruction 6.1
Effective date 30 December 2018**

**Objective:** To define the requirements for establishing Registers and Supplier Panels

**Relevant Direction:** 6.1 Use of Registers and Supplier Panels

## 6.1.1 Approving a Register

In giving such approval, the Secretary must:

set out whether the Register is approved as a whole of government register or for Agency-specific use;

confirm that the operational support to be provided by the Agency maintaining the register is appropriate and that the Agency has the appropriate capability; and

confirm that the Register complies with the requirements in Instruction 6.1.2.

The Secretary will publish the names of current approved whole-of-government Registers and agency-specific Registers.

Agencies other than the Agency responsible for an Agency-specific Register may use an Agency-specific Register with the written consent of the Agency responsible for the Agency-specific Register.

####  Transitional use of Registers

Agencies are permitted to use Registers already in operation, pending approval under Direction 6.1(b), in accordance with the transitional processes published by the Department.

If, under the processes described in paragraph (d), an Agency is advised that a Register is no longer permitted for transitional operation, the Agency must discontinue operation of that Register from the date the Agency is notified of the decision.

## 6.1.2 Requirements for establishing a Register

All Registers must:

clearly define the purpose, target users and responsible persons for the Register;

document conditions, obligations and undertakings of the responsible Agency, applicants and registrants, which form the terms of agreement between the parties including having required professional registrations in place;

provide for those conditions to be publicly available to prospective applicants and reissued to registrants when they are altered;

apply assessment criteria, including the mandatory evaluation criteria set out in Instruction 3.7.3, using a process that is fair and consistent for all applicants;

be an open system that allows applications to be made at any time and to also be publicly advertised at least once each year or employ continuous advertisement process such as on a website;

provide for both an ongoing and a periodic review of registrants;

manage feedback on the performance of registrants;

undertake reviews, preferably once a year, which may be in the form of a performance report; and

maintain records of reviews;

advise applicants and registrants of their current status and, where relevant, of actions necessary to enable or retain registration;

provide an appeal process, independent of those responsible for the Register, where an application has been refused or where downgrading or removal from the Register is proposed; and

provide for the suspension or de-registration of registrants who no longer meet the assessment criteria or whose performance is proven to be poor.

## 6.1.3 Mandatory registration categories or classifications for Registers

The Secretary may determine certain categories or classifications of suppliers of Works or Construction Services are to be maintained and to nominate appropriate Register(s).

## 6.1.4 Supplier Panels

Supplier Panels are typically established to enable rapid selection and engagement of a supplier because the terms of engagement and nominated rates are already in place.

When establishing a Supplier Panel, Agencies must:

establish the Supplier Panel using an open tender or Selective Tender;

establish rules of use that are consistent with the principles set out in Direction 1.2;

establish and operate the Supplier Panel for a period for time specified in the initial Tender Documentation (for example, three years with an option to extend for one year);

require members of a Supplier Panel to enter into an agreement with the sponsoring Agency, which sets out the type of Works or Construction Services that may be procured from the Supplier Panel and the terms and conditions on which the Works or Construction Services will be performed;

require members of a Supplier Panel to nominate rates and, where appropriate, personnel for the Works or Construction Services to be performed under the Supplier Panel agreement;

identify any other requirements including specialist qualifications or certification such as industry-specific health and safety certification that must be met by members of a Supplier Panel; and

establish appropriate processes to monitor and record performance of members of a Supplier Panel under the Panel agreement.

For the avoidance of doubt, a forward notice as set out in Instruction 5.1 must be used when establishing a Supplier Panel. Once established, forward notices do not need to be used when using a Supplier Panel in accordance with the rules of use for that Supplier Panel.

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 6.1.1 | New paragraph added that clarifies that Agencies other than the Agency responsible for an Agency-specific Register may use an Agency-specific Register with the written consent of the Agency responsible for the Agency-specific Register. | DTF |
| 1 | 30/12/2018 | 6.1.4 | New sub-paragraph (c) inserted to clarify when forward notices need to be used when establishing and using a Supplier panel. | DTF |

# Contracting requirements

**Public Construction – Instruction 7.1
Effective date 30 December 2018**

**Objective:** To prescribe approved contracts and rules for contract use, to promote the consistent use of contracts

**Relevant Direction:** 7.1 Contracting requirements

## 7.1.1 Victorian Public Construction Contracts

The Victorian Public Construction Contracts are those contracts listed as being Victorian Public Construction Contracts on the Department’s website.

The Victorian Public Construction Contracts approved under Instruction 7.1.1(a) must be:

published on the Department’s or an Agency’s website; or

made available for inspection on request where publication is not possible due to third party intellectual property rights.

## 7.1.2 Use of Victorian Public Construction Contracts

(aa) An Agency is permitted under Direction 7.1.2(a)(ii) to issue a tender that includes an alternative form of contract for Works or Construction Services valued up to $15,000 (inclusive of GST).

An Agency is permitted under Direction 7.1.2(a)(ii) to issue a tender that includes an amended Victorian Public Construction Contract or an alternative form of contract if one or more of the following circumstances apply:

Victorian Public Construction Contracts are inappropriate for the type of Works or Construction Services being procured;

Victorian Public Construction Contracts do not sufficiently address interface issues where there are multiple contractors working on a site or where the Works are undertaken on an operational site; or

the Works or Construction Services relate to leased premises or third party property where the form of contract is required to be approved by the lessor or such third party.

Within 30 days after issuing a tender that relies on paragraph (a), the Accountable Officer must provide a copy of the contract to the Department and details of the applicable circumstances.

####  Transitional use of agency precedent contracts

Agencies are permitted to use existing precedent forms of contract instead of Victorian Public Construction Contracts in accordance with the transitional processes published by the Department.

If, under the processes described in paragraph (c), an Agency is advised that a contract is no longer permitted for transitional use, the Agency must discontinue use of that contract from the date the Agency is notified of the decision.

## 7.1.3 Departures to contracts during tender negotiation

For the purposes of Direction 7.1.3, a material contract departure is one that, taking into account the value, complexity and risk of the Works or Construction Services, could substantially impact the manner in which Public Construction Procurement is undertaken by other Agencies.

A material contract departure must only be accepted during tender negotiations following approval by the Secretary.

A request for approval under paragraph (b) must be made in writing to the Secretary by an Accountable Officer, including:

the contract departure marked up against the contract issued at tender; and

the reasons why the departure or departures should be accepted.

## 7.1.4 Amendments to contracts during life of contract

For the purposes of Direction 7.1.4, a material contract amendment is one that, taking into account the value, complexity and risk of the Works or Construction Services, could substantially impact the manner in which Public Construction Procurement is undertaken by other Agencies.

A material contract amendment must only be agreed to following approval by the Secretary.

A request for approval under paragraph (b) must be made in writing to the Secretary by an Accountable Officer, including:

description of the nature of the proposed amendment;

explanation as to how the proposed amendment arose; and

reasons why the proposed amendment should made.

| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
| --- | --- | --- | --- | --- |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 7.1.2 | New paragraph (aa) inserted that allows Agencies under Direction 7.1.2(a)(ii) to issue a tender that includes an alternative form of contract for Works or Construction Services valued up to $15,000 (inclusive of GST). | DTF |
| 1 | 30/12/2018 | 7.1.2(a)(i) | Clarify that this clause refers to both Works or Construction Services being procured. | DTF |
| 1 | 30/12/2018 | 7.1.2(a)(ii) | Clarify the use of the defined term Works. | DTF |
| 1 | 30/12/2018 | 7.1.3(b) | Remove the words ‘or a person authorised in writing by the Secretary’.An interpretive provision that states that the Secretary may approve any person to perform any of the Secretary’s duties or powers is inserted to the Introduction to the Instructions. This edit makes every reference to the Secretary consistent, by removing any (now superfluous) references. | DTF |
| 1 | 30/12/2018 | 7.1.4(b) | Remove the words ‘or a person authorised in writing by the Secretary’.An interpretive provision that states that the Secretary may approve any person to perform any of the Secretary’s duties or powers is inserted to the Introduction to the Instructions. This edit makes every reference to the Secretary consistent, by removing any (now superfluous) references. | DTF |

# Contractual terms and conditions

**Public Construction – Instruction 7.2
Effective date 30 December 2018**

**Objective:** To define requirements for contracts and establish greater consistency in contracting arrangements

**Relevant Direction:**  7.2 Contractual terms and conditions

## 7.2.1 Compliance with legislative and policy requirements

Agencies must ensure that all contracts for Works or Construction Services comply with relevant legislative requirements.

Agencies must ensure that the following government policy requirements, where they apply, are addressed in all contracts for Works or Construction Services:

Partnerships Victoria Requirements;

Victorian Alliancing Policy;

Fair Payments Policy;

Protective Data Security Standards;

Whole of Victorian Government Intellectual Property Policy Intent and Principles;

DataVic Access Policy;

Supplier Code of Conduct;

Local Jobs First – Victorian Industry Participation Policy;

Major Projects Skills Guarantee; and

Victoria’s Social Procurement Framework.

Agencies must ensure that contracts for Works or Construction Services that are required to comply with the shared reporting regime in Instruction 8.2:

obtain supplier consent for performance information for that contract being used to evaluate the supplier in future Victorian Government tenders;

link to provisions in the Tender Documentation; and

require the supplier to cooperate with the shared reporting regime.

To give contractual effect to commitments made by suppliers under Instruction 4.1.5, Agencies must ensure that contracts for Works or Construction Services:

include continuing obligations on the supplier, that apply from the date the tender is submitted and survive contract termination or expiry, that mirror the probity commitments made by the Contractor in the tender process; and

entitle the Agency to remedies if the obligations are breached, including remedies for substantial breach where appropriate.

Agencies must ensure that all contracts for Works or Construction Services grant the Agency sufficient rights to comply with legal or policy requirements to disclose information.

When procuring services for geotechnical investigations, or Works or Services that may require geotechnical investigations, Agencies must ensure that their contracts provide for the ownership and custody of geoscience data collected for the project to be transferred to the State of Victoria, where:

‘geoscience data’ includes geological, geotechnical and environmental information, reports, maps, images, recordings, survey results and drill core, drill cutting and associated materials embodied in any form; and

‘geoscience data collected for the project’ includes geoscience data generated, placed, stored, processed, retrieved, printed, accessed, or produced using data supplied by the Principal, for the purpose of the contract.

When procuring Works or Construction Services, Agencies must ensure that their contracts prohibit the installation or design into any building of Type A or Type B Construction a Prescribed Combustible Product as part of an External Wall (including as an attachment), as per the **Minister’s Guideline MG-14: Issue of building permits where building work involves the use of certain cladding products**, unless the Contractor or designer has obtained a determination of the Building Appeals Board that the installation of the Prescribed Combustible Product complies with the **Building Act 1993 (Vic)**.

When procuring Works that may require the use of tip trucks, Agencies must ensure that their contracts require the Contractor to ensure that any tip truck owner driver engaged in connection with excavation work, directly or indirectly, through one or more subcontractors, is paid according to the following requirements:

if a tip truck owner driver is to be paid at an hourly rate then the hourly rate must be at least the applicable rate listed in the [Rates and Cost Schedules for Tip Truck Owner Drivers](http://www.business.vic.gov.au/setting-up-a-business/owner-drivers-and-forestry-contractors/owner-drivers-and-hirers/rates-and-cost-schedules) developed by Transport Industry Council plus any Freight Broker fees due and payable and road tolls reasonably incurred;

if a tip truck owner driver is to be paid on a per load rate then the per load rate must be arrived at based on a reasonable estimate of the time likely to be required to complete the specific job, multiplied by the applicable rate listed in the [Rates and Cost Schedules for Tip Truck Owner Drivers](http://www.business.vic.gov.au/setting-up-a-business/owner-drivers-and-forestry-contractors/owner-drivers-and-hirers/rates-and-cost-schedules) developed by Transport Industry Council, and adjusted for any agreed incentive component plus any Freight Broker fees due and payable and road tolls reasonably incurred;

for the purposes of calculating a per load rate, a reasonable estimate of the time likely to be required must:

* + 1. take into account all of the relevant circumstances of the specific job, including but not limited to the volume or weight of the load to be moved, distance to be travelled for transfer, local traffic conditions, time of day, expected waiting times, special site conditions and other special circumstances; and
		2. be based on what a competent and experienced person in the position of the person engaging the tip truck owner driver would consider to be a reasonable estimate.

if a per load rate includes an incentive component in addition to the minimum hourly rate, this incentive component may be reduced in proportion to any shortfall in the load moved, as agreed between the tip truck owner driver and the party engaging them;

where project specific requirements (such as, but not limited to, additional safety requirements) add to the costs that would normally be incurred by the tip truck owner driver, then payments to the tip truck owner driver may need to be increased by the rate determined by the Principal, and

if the tip truck owner driver is underpaid, the Contractor must make good that underpayment or otherwise ensure that it is paid.

## 7.2.2 Non-Standard Commercial Arrangements

Non-Standard Commercial Arrangements must only be proposed or agreed to following approval by the Secretary.

A request for approval under paragraph (a) must be made in writing to the Secretary by an Accountable Officer, specifying:

the nature of the proposed arrangement;

how the proposed arrangement arose; and

reasons why the proposed arrangement should be approved.

## 7.2.3 Early termination (termination for convenience)

If a contract gives the Principal the right to terminate early, the contract must meet the requirements in paragraphs (b) and (c).

In the event the Principal exercises the right, the Contractor must be required to:

cease work within the time directed by the Principal;

demobilise its equipment and personnel from the site;

secure the site and Works performed to date; and

in all circumstances mitigate its costs.

Other than for exceptional projects or where appropriate for the delivery model, the Contractor must not be entitled to:

future profit on the Works or Construction Services not performed under the Contract; or

compensation for economic or consequential loss, including opportunity cost or profit forgone as a result of entering into the contract.

## 7.2.4 Subcontracting

Agencies must require, at a minimum, statutory declarations from Contractors stating that payments have been made to subcontractors in the form set out in Attachment 1 to this Instruction 7.2.

## 7.2.5 Liability caps and exclusions

A Contractor’s liability must not be excluded or limited for:

third party claims against the Principal in respect of personal injury, death, loss or damage to any property;

wilful misconduct, wilful default, wilful neglect, gross negligence, fraud or criminal acts or omissions of the Contractor, its employees or agents;

liability which cannot be excluded at law; and

abandonment of work under the Contract by the Contractor.

***Attachment 1 to Instruction 7.2 Proof of payment to subcontractors***

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 27/08/2018 | 7.2.1 (h) | New sub-paragraph (h) inserted to describe the policy Minimum rates of pay for tip truck owner drivers on government projects | DTF |
| 2 | 30/12/2018 | 7.2.2(a) | Remove the words ‘or a person authorised in writing by the Secretary’.An interpretive provision that states that the Secretary may approve any person to perform any of the Secretary’s duties or powers is inserted to the Introduction to the Instructions. This edit makes every reference to the Secretary consistent, by removing any (now superfluous) references. | DTF |

# Debrief for tender participants

**Public Construction – Instruction 8.1
Effective date 1 July 2018**

**Objective:** To define the requirements for debriefing tender participants

**Relevant Direction:**  8.1 Debrief for tender participants

Where Direction 8.1 requires an Agency to conduct a debrief, the debriefs should be:

provided with a reasonable time after the tender process has concluded and the successful supplier is engaged;

conducted by an appropriately senior public official along with, where appropriate and consistent with probity requirements, any relevant consultants supporting the process;

positive and provide the supplier with feedback that promotes continuous improvement; and

conducted in a manner that is consistent with the probity principles in Direction 4.1, in particular Agencies must ensure that they respect and protect the confidential information, including commercially sensitive information and intellectual property of other tender participants.

# Supplier performance and shared reporting regime

**Public Construction – Instruction 8.2
Effective date 30 December 2018**

**Objective:** To define the requirements for the assessment of suppliers’ performance

**Relevant Direction:**  8.2 Shared reporting regime

## 8.2.1 Regime to apply to new procurement only

Public Construction Procurement starting on or after 1 July 2018 must comply with this Instruction 8.2.

## 8.2.2 Performance reporting

In addition to any other means of assessing how suppliers perform, Agencies must assess how suppliers perform using the template nominated by the Secretary when:

for suppliers of Works - the value of the contract engaging the supplier is $500,000 (inclusive of GST) or higher, or

for suppliers of Construction Services - the value of the contract engaging the supplier is $200,000 (inclusive of GST) or higher;

with the exception of suppliers engaged under contracts that comply with the Public Private Partnerships requirements or the Victorian Alliancing Policy.

Subject to paragraph (a), Agencies must report on how suppliers perform. Completed reports must be submitted to the website or system nominated by the Secretary at the times set out in Instructions 8.2.2 and 8.2.3.

When assessing how suppliers perform Agencies must provide the supplier with an opportunity to reply to the assessment. This opportunity to reply may be time limited.

Agencies may assess and report on how suppliers of Works or Construction Services perform when the value of the contract engaging the supplier is less than that set out in paragraph (a) of Instruction 8.2.1 using the template nominated by the Secretary.

## 8.2.3 When to assess how suppliers of Works perform

Assess how suppliers of Works perform:

every six calendar months from the date of possession of the site until practical completion of the Works, when the expected duration of the contract engaging the supplier is 12 months or longer;

within 30 days of the date for practical completion of the Works;

within 30 days of the end of the defects liability period for the Works; and

at any time when a significant issue affecting the supplier’s performance arises.

If a performance report required under paragraph (a) of Instruction 8.2.2 is due to fall within two calendar months of the performance report required at practical completion of the Works, only the performance report at practical completion of the Works need be completed.

## 8.2.4 When to assess how suppliers of Construction Services perform

Assess how suppliers of Construction Services perform:

every six calendar months, when the expected duration of the contract engaging the supplier of Construction Services is 12 months or longer;

within 30 days of the end of the contract engaging the supplier of Construction Services;

for suppliers of Construction Services engaged as designers of buildings or infrastructure - within 30 days of the date when the later of the final design or working drawings and related documents (such as the specification) are submitted;

for suppliers of Construction Services where their services affect the delivery of buildings or infrastructure -

within 30 days of the date for practical completion of the Works; and

within 30 days of the end of the defects liability period for the Works;

at any time when a significant issue affecting the supplier’s performance arises.

If two performance reports are required within 2 calendar months of each other, only the later of the two reports need be completed.

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 8.2.2(a) | Add the words “In addition to any other means of assessing how suppliers perform,’ at the beginning of the paragraph. | DTF |

# Complaints

**Public Construction – Instruction 8.3
Effective date 1 July 2018**

**Objective:** To define the requirements for complaint handling

**Relevant Direction:** 8.3 Complaints

Agencies must ensure that they handle complaints from suppliers and potential suppliers in an appropriate manner.

# Standards for public construction

**Public Construction – Instruction 9.1
Effective date 1 July 2018**

**Objective:** To set standards relating to public construction

**Relevant Direction:** 9.1 Standards for public construction

9.1.1 Standard for constructing a community fire refuge

This Standard applies to public construction (as defined in the **Project Development and Construction Management Act 1994 (Vic)**, by or on behalf of Agencies, of any building to be used as a community fire refuge.

Community fire refuge has the meaning given to it in section 50A of the **Country Fire Authority Act**.

The objective of a community fire refuge is to provide a place that may be used by the public for short-term shelter from a fire front during a bushfire. This Standard is concerned with establishing the standards for design, construction, modification, and maintenance of a building (or part(s) of a building) to enable such a building (or part(s) thereof) to be used as a community fire refuge.

Performance requirements:

All aspects of the public construction by, or on behalf of, a department or public body, in relation to a building (or part thereof) to be used as a community fire refuge must follow the [**Construction and Project Management Guidelines for Community Fire Refuge**](https://www.emv.vic.gov.au/publications/construction-project-management-guidelines-for-community-fire-refuge) (issued by Emergency Management Victoria)**,** or any replacement document.

To avoid doubt, if a building (or part of a building) to be used as a community fire refuge, has another use when not being used as a community fire refuge it must also comply with the **Building Code of Australia** requirements applicable to its classification. Examples of buildings that may also be a community fire refuge include a school, fire station, public hall, sporting club rooms, sport change rooms, sports stadium, community centre or other public buildings.

# Agencies that must comply with government procurement requirements under International Agreements

**Public Construction – Instruction 2.1 – Attachment 1
Effective date 1 July 2018**

## Application of International Agreements

Agencies that must comply with International Agreements:

All Departments

Commission for Children and Young People

Essential Services Commission

Game Management Authority

Independent Broad-Based Anti-corruption Commission

Office of Public Prosecutions

Office of the Chief Commissioner of Police (Victoria Police)

Office of the Commissioner for Environmental Sustainability

Office of the Fire Services Levy Monitor

Office of the Freedom of Information Commissioner

Office of the Legal Services Commissioner

Office of the Ombudsman

Office of the Privacy Commissioner

Office of the Road Safety Camera Commissioner

Office of the Victorian Inspectorate

Taxi Services Commission

Victorian Auditor-General’s Office

Victorian Commission for Gambling and Liquor Regulation

Victorian Electoral Commission

Victorian Equal Opportunity and Human Rights Commission

Victorian Public Sector Commission

Victorian Responsible Gambling Foundation

# Government procurement requirements under International Agreements

**Public Construction – Instruction 2.1 – Attachment 2
Effective date 30 December 2018**

## 1. General requirements of International Agreements

### 1.1 Non-discrimination and equal treatment

Tender participants from other countries must be given the same opportunity to compete for government business as local tender participants.

Local tender participants must not be discriminated against on the basis that they have foreign shareholders or that they supply products originating in other countries.

Technical specifications and evaluation criteria should not be worded to exclude international tender participants.

Tender participants must not be required to provide offsets – which includes requirements for local content, use of domestic suppliers, licensing of technology, counter-trade or actions – to encourage local development, other than where required by Victorian laws (such as those relating to trade qualifications) or policies (such as the Victorian Industry Participation Policy).

### 1.2 Conditions of participation

Conditions of participation that inappropriately discriminate against international tender participants are not permitted.

Most common conditions for participating in a tender are acceptable under International Agreements. Examples of permitted conditions of participation include:

* legal capacity to enter a binding agreement;
* financial capacity appropriate for the scale and type of the project;
* commitment to the Victorian Supplier Code of Conduct; or
* appropriate licences or professional qualifications.

A condition requiring prior work experience in Victoria would discriminate against potential international tender participants and would not be acceptable.

## 2. Form of tender

### 2.1 Open tenders

An open tender is the preferred approach to market under International Agreements.

### 2.2 Selective Tenders

Registers used to select participants for Selective Tenders must either be continuously open to new applicants for registration or opened to new applicants at least once every 12 months. Registers approved under Instruction 6.1 meet this requirement. When using a Register to select participants by Selective Tender, the following requirements apply.

The intention to conduct a Selective Tender must be openly advertised (by using a forward notice in accordance with Instruction 5.1) at least 25 calendar days before the Tender Notice is released to the selected tender participants. This time period can be reduced if the procurement is demonstrably urgent, but must be at least 10 calendar days.

During the 25 calendar day period, potential tender participants who are already on the Register may express their interest in being considered for the tender. Potential tender participants who are not already listed on the Register may also express interest and initiate an application for registration. If the registration process cannot reasonably be completed in the time available there is no obligation to delay the tender while the application is dealt with.

A process for dealing with these expressions of interest is not prescribed by International Agreements but the expressions of interest should be considered when selecting the field of tender participants. When deciding which prequalified suppliers will be invited to bid, there is no obligation to include parties who express interest or to exclude others who did not express interest.

The forward notice must specify the number (or expected number) of tender participants who will be invited to submit a response. The criteria by which tender participants will be selected must also be described. If the forward notice does not cover these requirements, then all suitable potential tender participants listed on the Register must be invited to submit a response.

A supplier who, in response to the forward notice, expresses interest in participating in a Selective Tender should be promptly informed of the Agency decision as to whether or not they will be invited to tender.

### 2.3 Limited Tenders

Limited Tenders are allowed under any of the Special Circumstances provided for by Instruction 3.2.2 *except* paragraphs (g) and (j).

When a Limited Tender is used a written a report must be created recording what was procured, the circumstances that justified the Limited Tender and to demonstrate how value for money was obtained.

## 3. Market-led proposals

Market-led proposals (also called unsolicited proposals) are permitted when conducted in accordance with the Victorian Government Market-led Proposals Guideline.

## 4. Notice requirements

### 4.1 Forward notice

Except for the 25 calendar day notice period for Selective Tenders, International Agreements do not specify the lead time for a forward notice, but do allow reductions in the required tender open period if a forward notice has been published.

### 4.2 Tender Notice

Complying with Instruction 3.4 (Tender Notices) meets the requirements of International Agreements.

## 5. Tender open period

Tenders must be open for at least 40 calendar days. This period can be reduced by 5 calendar days for each of the following circumstances:

the Tender Notice is published electronically;

the Tender Documentation is available electronically; and

responses can be submitted by electronic means.

A tender open period may be reduced to no less than 10 calendar days if:

there is a substantiated state of urgency; or

a forward notice was published at least 40 calendar days – but no longer than one year – before the Tender Notice and if the forward notice contained the same information that would have otherwise have been provided by the Tender Notice.

These requirements apply to open tenders and Selective Tenders. These requirements may apply to, but are not mandatory for, Limited Tenders.

## 6. Tender close

A response must not be excluded from consideration if it was submitted late because of some fault on the part of the Agency.

## 7. Evaluation criteria

Evaluation criteria must not discriminate between local tender participants and those from other countries.

The Tender Documentation must disclose the relative importance of the evaluation criteria. This requirement may be met by either:

describing the weightings applied to each evaluation criterion; or

by listing the evaluation criteria in order of importance.

Where not all evaluation criteria are weighted, the Tender Documentation should explain how certain criteria will be assessed using weightings or the order of importance, with other matters then considered in making the final value for money determination.

## 8. Post tender negotiations

Post tender negotiations are only permitted if:

the Tender Notice advised that post tender negotiations either would or may be conducted; or

following the evaluation, no response is obviously the most advantageous in terms of the evaluation criteria.

The restriction on post tender negotiations does not inhibit the right to meet with tender participants to clarify their responses.

Post tender negotiations must apply the evaluation criteria listed in the Tender Documentation.

If, following any post tender negotiations, tender participants are requested to submit revised responses, the same opportunity within the same time period must be provided to all tender participants under consideration.

## 9. Domestic dispute resolution

### 9.1 Use of domestic dispute resolution arbitration clause

Tender documents for covered procurements must include the domestic dispute resolution arbitration clause, as published by the Secretary and as amended from time to time.

Agencies may make minor or technical amendments to the domestic dispute resolution arbitration clause as required to align the clause with the structure and terminology of their tender documents.

### 9.2 Disputes not covered by a domestic dispute resolution arbitration clause

In this paragraph 9.2:

‘relevant jurisdiction’ means those jurisdictions to which the measures apply, a list of which is published at [https://www.buyingfor.vic.gov.au](https://www.content.vic.gov.au/sites/default/files/2018-12/List-of-relevant-jurisdictions-for-domestic-dispute-resolution.docx); and

(ii) ‘measures’ means the Victorian Government’s measures to implement the procurement requirements of international agreements, a list of which is published at [https://www.buyingfor.vic.gov.au](https://www.content.vic.gov.au/sites/default/files/2018-12/List-of-measures-implementing-procurement-requirements-of-international-agreements.docx).

If a supplier, whose principal place of business is in a relevant jurisdiction, wishes to bring a complaint or challenge that there has been a failure of the procuring entity to comply with one or more measures in relation to a covered procurement, but that supplier is unable for any reason to rely on a binding domestic dispute resolution arbitration clause:

the supplier may deliver a notice of complaint that cites this provision;

the supplier and the procuring entity must negotiate and, if negotiation is unsuccessful, mediate, on the same terms as items 1.5 and 1.6 in the domestic dispute resolution arbitration clause;

if the complaint is not finally resolved by mediation within 28 days of the mediation notice, the supplier may deliver a written request for arbitration;

on receipt of a written request for arbitration, the procuring entity must invite the supplier to arbitrate on the same terms as the domestic dispute resolution arbitration clause, subject to any necessary modification.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | 2.2 | Remove the words ‘The information in this section is expected to change soon. Expected changers are explained in fact Sheet Forthcoming international agreements.’ | DTF |
| 1 | 30/12/2018 | 2.2 | Insert additional requirements on using a Register to select participants by Selective Tender. | DTF |
| 1 | 30/12/2018 | 4.1 | Insert the words “Except for the 25 day notice period for Selective Tenders,’ at the beginning of the paragraph. | DTF |
| 1 | 30/12/2018 | 5 | Remove the words ‘The information in this section is expected to change soon. Expected changers are explained in fact Sheet Forthcoming international agreements.’In the first sentence of the first paragraph, change reference to ‘30 calendar days’ to ’40 calendar days’.In the second sentence of the first paragraph, change the period that can be reduced from ‘25 calendar days’ to ‘5 calendar days for each of the following circumstances:’At the end of the first paragraph, remove the words ‘if all of the following three requirements are satisfied’. | DTF |
| 1 | 30/12/2018 | 5 | In the second paragraph, insert the words ‘no less than’ before 10 calendar days. | DTF |
| 1 | 30/12/2018 | 9 | Inclusion of Domestic dispute resolution | DTF |
| 2 | 13/2/2018 | 9 | Minor editorial changes to use full term domestic dispute resolution instead of acronym  | DTF |

# Mandatory evaluation criteria for occupational health and safety

**Public Construction – Instruction 3.7 – Attachment 1
Effective date 1 July 2018**

## Occupational health and safety (OHS) management criteria for suppliers of Works

The supplier of Works must **demonstrate**:

1. the supplier of Works or Construction Services’ organisational-specific OHS policy, at the least, states:
* a clear commitment to providing for the health and safety of all employees and other workers and others who may be affected by their activities, and achieving legal compliance, through effective risk management;
* the means by which that commitment will be met (e.g. risk assessment, safe systems of work, training);
* the respective responsibilities and roles of stakeholders at all levels within and external to the organisation in ensuring safety; and
* a commitment to continuous improvement and policy review, including a date or time within which the policy will be reviewed.
1. details of the governance (management) structure and process that provide for:
* the gathering and analysis of relevant information;
* reports on relevant matters to be provided to the officers, in a timely fashion (e.g. regular reporting on some matters and timely reporting of incidents);
* advice to be provided to the officers (from sources within and external to the business);
* monitoring, auditing and review of performance; and
* confirmation that information provided to officers allows them to have the required knowledge and understanding of each of the elements of the due diligence definition (e.g. as to hazards and risks, required resources and policies).
1. expertise and knowledge of OHS advisors, covering:
* all key aspects of OHS relevant to the business and activities of the supplier of Works; and
* advisor(s) are suitably qualified taking into consideration the nature of the activities of the supplier of Works.
1. consultation and issue resolution procedures:

4a management representation for consultation, issue identification and response;

4b elected Health and Safety Representative;

4c consultation and issue resolution procedures; either:

* details of any Health and Safety Committee and the charter or constitution or rules that show how the Committee operates; or
* certification that there has been no request for the establishment of a Health & Safety Committee;

4d consulting and working with other parties.

1. currency of awareness of OHS issues.
2. induction and training:

6a that they have in place appropriate processes for induction and training; and

6b that they have in place appropriate records for induction and training.

1. hazard identification and risk control:

7a that they have in place appropriate the means by which hazards and risks associated with the activities are identified, assessed and controlled; and

7b that they have in place appropriate the means for compliance with specific requirements, such as by completed Job Safety Analysis, safe work method statements and the means of coordinating safety activities on site.

1. that they have in place appropriate safety management procedures for the safety of independent supplier of Works and of the employees of independent contractors and others.
2. emergency response:

9a that they have in place appropriate emergency response procedures including review and testing requirements, the availability of suitable first aid facilities, and employee first aid training, and

9b that they have in place appropriate effective dissemination of emergency response information and of testing of emergency response procedures in the past 12 months.

1. incident notification, investigation and response procedures:

10a that they have in place appropriate system for the notification of all incidents internally and (where relevant) to the employer with management and control of the workplace;

10b that they have in place appropriate system for the notification of incidents to WorkSafe Victoria; and

10c that they have in place appropriate system for investigating incidents to determine causes, identify and implement appropriate action to prevent a recurrence.

1. evidence of enforcement activity, or where there has been no enforcement activity a signed statement to that effect.
2. Workers Compensation insurance, providing evidence of currency of insurance, premium rate and industry classification (e.g. premium notice).

Criteria 1 – 10 may be demonstrated by:

* certification under an approved assurance system listed in Instruction 3.7.5, or
* submission of evidence as described in the Guide to OHS criteria, Guides to acceptable evidence relevant to each criterion.

Criteria 11 – 12 can only be demonstrated by:

* submission of current information as described in the Guide to OHS criteria, Guides to acceptable evidence relevant to each criterion.

**Application of the occupational health and safety management criteria for suppliers of Works**

**Where a supplier of Works does not hold prequalification** under an approved Register and submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that a supplier of Workshas complied with criteria 1 to 12.

**Where a supplier of Works submits an application for prequalification** under an approved Register:

* Demonstration to the satisfaction of the Manager of the approved Register that a supplier of Works has complied with criteria 1 - 12.

**Where a supplier of Works is prequalified** under an approved Register or a member of a Supplier Panel submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that the supplier of Workshas:
* confirmed to the Agency that the supplier of Works remains on the approved Register or Supplier Panel, and
* confirmed to the Agency that there has been no material change to the information submitted to satisfy criteria 1 - 12 that would impact the supplier of Works’ ability to satisfy those criteria.

***Detailed guide Occupational health and safety management criteria***

## Occupational health and safety (OHS) management criteria for suppliers of Construction Services as designers of buildings and structures

The supplier of Construction Services as designers of buildings and structures must **demonstrate**:

1. OHS duties of designers of buildings and structures:

1a the corporate position on OHS in design and how it is disseminated;

1b commitment to addressing health and safety in design at project level;

1c systematic approach to address health and safety risks in design;

1d the means by which the supplier builds, maintains and continuously enhances OHS knowledge and capabilities from a design perspective; and

1e management review of overall OHS performance in design project.

Suppliers of Construction Services as designers of buildings and structures must also demonstrate compliance with Criteria 2 – 12 listed for Occupational health and safety (OHS) management criteria for suppliers of Construction Services.

**Application of the occupational health and safety management criteria for suppliers of Construction Services as designers of buildings and structures**

**Where a supplier of Construction Services as designers of buildings and structures does not hold prequalification** under an approved Register and submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that a Construction Services as designers of buildings and structures has complied with criteria 1 to 12.

**Where a supplier of Construction Services as designers of buildings and structures submits an application for prequalification** under an approved Register:

* Demonstration to the satisfaction of the Manager of the approved Register that a supplier of Construction Services as designers of buildings and structures has complied with criteria 1 - 12.

**Where a supplier of Construction Services as designers of buildings and structures is prequalified** under an approved Register or a member of a Supplier Panel submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that the supplier of Construction Services as designers of buildings and structures has:
* confirmed to the Agency that the supplier of Construction Services as designers of buildings and structures remains on the approved Register or Supplier Panel, and
* confirmed to the Agency that there has been no material change to the information submitted to satisfy criteria 1 - 12 that would impact the supplier of Construction Services as designers of buildings and structures’ ability to satisfy those criteria.

***Detailed guide Occupational health and safety management criteria***

## Occupational health and safety (OHS) management criteria for suppliers of Construction Services

Note: if the supplier of Construction Services is not being engaged to perform design work, then they do not need to be assessed against Criterion 1.

The supplier of Construction Services must **demonstrate**:

1. the supplier of Construction Services’ organisational-specific OHS policy, at the least, states:
* a clear commitment to providing for the health and safety of all employees and other workers and others who may be affected by their activities, and achieving legal compliance, through effective risk management;
* the means by which that commitment will be met (e.g. risk assessment, safe systems of work, training);
* the respective responsibilities and roles of stakeholders at all levels within and external to the organisation in ensuring safety; and
* a commitment to continuous improvement and policy review, including a date or time within which the policy will be reviewed.
1. details of the governance (management) structure and process that provide for:
* the gathering and analysis of relevant information;
* reports on relevant matters to be provided to the officers, in a timely fashion (e.g. regular reporting on some matters and timely reporting of incidents);
* advice to be provided to the officers (from sources within and external to the business);
* monitoring, auditing and review of performance; and
* confirmation that information provided to officers allows them to have the required knowledge and understanding of each of the elements of the due diligence definition (e.g. as to hazards and risks, required resources and policies).
1. expertise and knowledge of OHS advisors, covering:
* all key aspects of OHS relevant to the business and activities of the supplier of Works; and
* advisor(s) are suitably qualified taking into consideration the nature of the activities of the supplier of Works.
1. consultation and issue resolution:

5a management representation for consultation, issue identification and response;

5b elected Health and Safety Representative;

5c consultation and issue resolution procedures,

5d Health and Safety Committee, either;

* details of any Health and Safety Committee and the charter or constitution or rules that show how the Committee operates; or
* certification that there has been no request for the establishment of a Health & Safety Committee;

5e consulting and working with other parties.

1. currency of awareness of OHS issues.
2. that they have in place appropriate induction and training processes and records.
3. hazard identification and risk control:

8a that they have in place appropriate means by which hazards and risks associated with the activities are identified, assessed and controlled; and

8b that they have in place appropriate means for compliance with specific requirements, such as by completed Job Safety Analysis, safe work method statements and the means of coordinating safety activities on site.

1. safety management:

9a that they have in place appropriate procedures for the safety of independent contractors and of the employees of independent contractors and others; and

9b that they have in place appropriate effective dissemination of emergency response information and of testing of emergency response procedures in the past 12 months.

1. emergency response:

10a that they have in place appropriate emergency response procedures including review and testing requirements, the availability of suitable first aid facilities, and employee first aid training;

10b that they have in place appropriate effective dissemination of emergency response information and of testing of emergency response procedures in the past 12 months; and

10c that they have in place appropriate system for investigating incidents to determine causes, identify and implement appropriate action to prevent a recurrence.

1. evidence of enforcement activity, or where there has been no enforcement activity a signed statement to that effect.
2. Workers compensation insurance, providing evidence of currency of insurance, premium rate and industry classification (e.g. premium notice).

Criteria 2 – 10 may be demonstrated by:

* certification under an approved assurance system listed in Instruction 3.7.5, or
* submission of evidence as described in the Guide toOHS criteria, Guides to acceptable evidence relevant to each criterion.

Criteria 11 – 12 can only be demonstrated by:

* submission of current information as described in the Guide to OHS criteria, Guides to acceptable evidence relevant to each criterion.

**Application of the occupational health and safety management criteria for suppliers of Construction Services**

**Where a Supplier of Construction Services does not hold prequalification** under an approved Register and submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that a supplier of Construction Services has complied with criteria 2 to 12.

**Where a supplier of Construction Services submits an application for prequalification** under an approved Register:

* Demonstration to the satisfaction of the Manager of the approved Register that a supplier of Construction Services has complied with criteria 2 - 12.

**Where a supplier of Construction Services is prequalified** under an approved Register or a member of a Supplier Panel submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that the supplier of Construction Services has:
* confirmed to the Agency that the tender participant remains on the approved Register or Supplier Panel, and
* confirmed to the Agency that there has been no material change to the information submitted to satisfy criteria 2 - 12 that would impact the tender participant’s ability to satisfy those criteria.

***Detailed guide Occupational health and safety management criteria***

# Mandatory evaluation criteria for industrial relations management

**Public Construction – Instruction 3.7 – Attachment 2
Effective date 1 July 2018**

## Industrial relations management criteria for suppliers of Works

The supplier of Works must demonstrate that it **has in place**:

1. An Industrial Relations Policy Statement that details:
2. the organisational structure for each project identifying the senior personnel, their responsibilities and the reporting lines;
3. the contact details of the people responsible for managing workplace relations matters;
4. the process for consulting and communicating with the workforce, including strategies to communicate with and manage the relationship with employees, subcontractors, construction unions and representatives of building associations;
5. the disputes resolution and grievance procedure; and
6. the process for managing subcontractor compliance with legal obligations.
7. A project specific Industrial Relations Plan that:
8. assesses the workplace relations risks specific to that project;
9. outlines approaches tailored to manage those specific risks;
10. outlines a contingency plan to respond to unforeseen risks;
11. outlines the proposed approach to compliance with legal obligations under relevant Commonwealth and State legislation, and industrial instruments including:
12. Commonwealth workplace relations legislation;
13. applicable enterprise agreements and modern awards;
14. applicable project agreements;
15. Victorian long service leave legislation;
16. Victorian occupational health and safety legislation;
17. Victorian workers compensation legislation;
18. Victorian and Commonwealth equal opportunity, anti-discrimination and charter of human rights and responsibilities legislation; and
19. legislation relating to the operation of superannuation;
20. proposed approach to managing employee’s entitlements;
21. outlines policies and procedures that detail the approach that will be taken to the selection, engagement and management of subcontractors; and
22. outlines strategies that will be put in place to ensure subcontractors comply with their legal obligations.

Demonstration that the supplier of Works has **submitted**:

1. the Industrial Relations Self-Assessment Checklist in the form of Schedule 1 of Guidance on Industrial Relations Management Criteria; and
2. a Declaration of Compliance with the Industrial Relations Management Criteria in the form of Schedule 2 of Guidance on Industrial Relations Management Criteria.

**Application of the industrial relations management criteria**

**Where a supplier of Works does not hold prequalification** under an approved Register and submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that a supplier of Works has complied with criteria 1 to 4.

**Where a supplier of Works submits an application for prequalification** under an approved Register:

* Demonstration to the satisfaction of the Manager of the approved Register that a supplier of Works has complied with criteria 1, 3 and 4.

**Where a supplier of Works is** **prequalified** under an approved Register or a member of a Supplier Panel and submits a tender or other offer to an Agency:

* Demonstration to the satisfaction of the Agency that a supplier of Works has:
* complied with criterion 2;
* confirmed to the Agency that the supplier of Works remains on the approved Register or Supplier Panel; and
* confirmed to the Agency that there has been no material change to the information submitted to satisfy criteria 1, 3 and 4 that would impact the supplier of Works’ ability to satisfy those criteria.

***Detailed Guidance 3.7 Industrial relations management mandatory evaluation criteria***

# Disclosure of contracts and variations to contracts

**Public Construction – Instruction 5.2 – Attachment 1
Effective date 30 December 2018**

## Information to be disclosed - key details of contracts

Disclose the information required by the applicable form on the website or system nominated by the Secretary for contracts for Works or Construction Services.

## Information to be disclosed - contracts subject to full disclosure

Disclose full contract information for contracts for Works or Construction Services, in addition to disclosing the information required by the applicable form on the website or system nominated by the Secretary:

* where the estimated value of the contract exceeds $10 million (inclusive of GST);
* where Financial Reporting Directive 12B (Disclosure of major contracts) applies; and
* subject to grounds to withhold certain information from disclosure.

Special provisions apply when disclosing the following documents forming part of a contract:

* plans or drawings; and
* where an Agency does not hold the right to publish a contract document.

### Plans or drawings forming part of a contract

Agencies are not required to publish online plans or drawings that form part of a contract.

Agencies must make plans or drawings that form part of the contract documents available for inspection on request, subject to any grounds to withhold certain information from disclosure.

Agencies must state that plans or drawings are available for inspection on request as part of the contract disclosure.

### Where an Agency does not hold the right to publish a contract document

Where an Agency does not hold the right to publish a contract document on a website, Agencies must make the documents available for inspection on request, subject to any grounds to withhold certain information.

Examples of contract documents where an Agency may not hold the right to publish on a website include:

* specifications prepared by a designer;
* site investigation reports; and
* technical reports.

Agencies must state which contract documents are available for inspection on request as part of the contract disclosure.

## Withholding certain information from contracts subject to full disclosure

Only trade secrets or genuinely confidential business information can be withheld from voluntary disclosure, along with material that, if disclosed, would seriously harm the public interest. Agencies will be guided by the criteria established in the **Freedom of Information Act 1982 (Vic)**.

A decision to withhold certain information or documents may be justified in certain circumstances to maintain confidentiality or privacy (including, for example, where confidentiality is a contractual requirement, or under specific legislation). Confidentiality and commercial in confidence clauses should only be included where there is strong justification for confidentiality.

Any decision to withhold certain information should be made on the basis of withholding the minimum amount of information and disclosing the balance of the information.

Agencies must state when a partial disclosure is made as part of the contract disclosure. Where appropriate, Agencies should state when the information that is withheld will be disclosed.

## Redacting information from contracts subject to full disclosure

Any decision to redact information from a contract document should be made on the basis of redacting the minimum amount of information and disclosing the balance of the information.

Agencies must state when a contract document is redacted and must describe the scope of the redaction within the document that is redacted.

Special provisions apply when redacting commercial business information presented in schedules to a contract:

* describing personnel;
* rates for works, services or personnel;
* Bill of Quantities;
* proprietary work method; and
* time schedule with related resource allocations.

### Schedule to a contract describing personnel

Agencies must keep the schedule within the disclosed document and:

* redact the names of personnel;
* redact resume information that allows personnel to be identified; and
* provide a list of the classifications of personnel subject to the redaction.

### Schedule to a contract describing rates for works, services or personnel

Agencies must keep the schedule including the description of the items to which the rates apply within the disclosed document and:

* redact the rate applied to the works or services; and
* disclose the total value of works or services subject to the rates.

### Schedule to a contract containing a Bill of Quantities

Agencies must keep the schedule including the list of bill items and bill quantities within the disclosed document and:

* redact the rate applied to each item;
* redact the value applied to the item; and
* disclose the total value of items listed in the Bill of Quantities.

### Schedule to a contract containing a proprietary work method

Agencies must keep the schedule within the disclosed document and:

* redact those elements of the work method that are proprietary; and
* disclose other parts of the work method that are general to the industry.

### Schedule to a contract containing a time schedule with related resource allocations

Agencies must keep the schedule within the disclosed document and:

* redact the resource allocations to the extent that this may expose a rate; and
* disclose the description of items and the time periods that apply.

## Disclosing contract variations

Agencies must update the contract disclosure record if variations or amendments are made to a contract for Works or Construction Services. Variations or amendments to contracts must be disclosed on the contract record to which the variation relates.

Variations to contracts must be disclosed, at the latest, when:

* for contracts for Works (when the Works are substantially complete at practical completion) - the contract reaches practical completion;
* for contracts for Works (when there are ancillary Works outstanding at practical completion) – the contract reaches practical completion for those Works completed up to practical completion, with additional variation disclosures, as needed, as the ancillary Works are completed; or
* for contracts for Construction Services – the contract ends.

Where a variation to a contract is subject to an unresolved claim at practical completion, disclose the variation subject to the claim as an additional variation disclosure when the claim is settled.

Amendments to contracts that follow from taking up options under the contract must be disclosed within 30 days of exercising the option.

A summary variation representing all the variations must be disclosed on the contract record. The summary variation must describe:

* the total value of all of the variations; and
* individually describe each variation with a value greater than the higher of either $100,000 (inclusive of GST) or more than 10% of the contract value. To avoid doubt, the value of each variation does not need to be disclosed.

The following table describes how to disclose changes under contracts for Works or Construction Services.

|  |  |  |
| --- | --- | --- |
| **Contract contains** | **Initial disclosure** | **Revised disclosure** |
| Contingency allowance | Contract description, contract duration and contract value of the initial scope as agreed to by the supplier, without disclosing the contingency allowance | Adjust the contract period and contract value as requiredTreat the additional works or services as one of the variations within the summary variation. The variation that arose via the contingency allowance does not need to be individually identified |
| Time period extension options | Contract description, contract period and contract value over the initial term as agreed with the supplier | Adjust the contract period and value as requiredDescribe each time period extension as if it was a variation, noting that it arose from a time period extension option under the contract |
| Options for additional Works or Construction Services | Contract description, contract duration and contract value of the initial scope as agreed with the supplier | Adjust the contract description, period and value as requiredDescribe each additional work or service as if it was a variation, noting that it arose from an option under the contract |
| Schedule of rates | Describe that the contract is a schedule of rates contractAdvise that periodic updates to the disclosure will be made to reflect the actual scope of the works or services undertakenDescribe the frequency when updates to the disclosure will be madeDisclose the initial scope of works and initial estimated contract value as instructed to the supplier | Adjust the contract description, period and value as requiredDescribe each additional component as if it was a variation, noting that it arose as a periodic disclosure under a schedule of rates contract |

The following table describes how to disclose Works or Construction Services undertaken in stages.

|  |  |  |
| --- | --- | --- |
| **Form of contract stage** | **Initial disclosure** | **Revised disclosure** |
| Project undertaken in stages, where separate contracts are awarded for each stage | Disclose each stage contract as a separate disclosureRefer to the other stage contracts by describing the other stage contracts and the applicable contract numbers | Update the disclosure for the first stage to refer to later stage contracts, by describing the other stage contracts and the applicable contract numbers |
| Single contract with provision for staged implementation | Contract description, contract duration and contract value of the first stage as agreed with the supplier | Adjust the contract description, period and value as additional stages are implementedDescribe each additional stage as if it was a variation, noting that it arose from staged implementation under the contract |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | Disclosing contract variations | In the paragraph ‘Variations to contracts must be disclosed, at the latest’, clarify when to disclose contract variations when there are ancillary Works outstanding at practical completion.Following the paragraph ‘Variations to contracts must be disclosed, at the latest’, insert new paragraph that clarifies when to disclose a variation to a contract that is subject to an unresolved claim at practical completion. | DTF |

# Proof of payment to subcontractors

**Public Construction – Instruction 7.2 – Attachment 1
Effective date 1 July 2018**

**Statutory Declaration**

**Project Name:** [insert project name]

**Contract Number:** [insert contract number]

|  |  |  |
| --- | --- | --- |
| **To:** | [insert name] (ACN [insert ACN]) of [insert address]and | ("***Principal***") |
|  | [insert name] (ACN [insert ACN]) of [insert address] | ("***Superintendent***") |
| **From:** | [insert name] (ACN [insert ACN]) of [insert address] | ("***Contractor***") |
| **In the matter of:** | the contract for the construction of the [insert description of the project] entered into between the *Principal* and the *Contractor* dated [insert date of *Contract*] | ("***Contract***") |
| **Period covered by this progress payment claim:** | from: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | ("***Payment Period***") |

I, [insert name] of [insert address], [insert occupation], do solemnly and sincerely declare as follows:

1. I am an employee duly authorised to make this statutory declaration on behalf of the *Contractor*;

2. all employees who are, or have been, engaged by the *Contractor* in connection with the *Contract* have been paid their full remuneration for work done during the *Payment Period* including any superannuation or redundancy payments (if applicable) and in accordance with any applicable award or industrial agreement;

3. subject to clause 4(d), all consultants, suppliers and subcontractors who are, or have been, engaged by the *Contractor* in connection with the *Contract* have been paid in full all amounts that have become payable to them under the terms of their agreement with the *Contractor* during the *Payment Period*;

4. as at the end of the Payment Period:

|  |  |  |
| --- | --- | --- |
| (a) | the total amount payable by the Contractor to all subcontractors in respect of work under the Contract is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (b) | the amount paid by the Contractor to all subcontractors in respect of work under the Contract is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (c) | the amount claimed by all subcontractors in respect of work under the Contract which is disputed by the Contractor as being due and payable is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (d) | the amount referred to in paragraph 4(c) of this statutory declaration is disputed as, at the date of this statutory declaration, on the following grounds:[insert grounds for dispute] |  |

**[Note: select jurisdiction from the list below and delete remaining jurisdictions as appropriate.]**

[VICTORIA]

**And I** acknowledge that this declaration is true and correct, and I make it in the belief that a person making a false declaration is liable to the penalties for perjury.

|  |  |  |  |
| --- | --- | --- | --- |
| *Declared* ***at******this day of 20******Before me:*** |  |  |  |
| ***Signed*** |
|  |  |  |  |
| ***Signature of person before whom the declaration is made*** |  |  | ***Name of Declarant*** |
|  |  |  |  |
| ***Name, qualification and contact address of person before whom the declaration is made*** |  |  |  |

**[AUSTRALIAN CAPITAL TERRITORY]**

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act* 1959, and I believe that the statements in this declaration are true in every particular.

Signature of declarant

*Declared* ***at on of 20***

***Before me:***

***Signature of witness***

***Full name of witness***

***Address of witness:***

***Qualification of witness***

**[NORTHERN TERRITORY]**

**And I make** this solemn declaration by virtue of the *Oaths, Affidavits and Declarations Act* 2010 and conscientiously believing the statements contained in this declaration to be true in every particular and knowing that it is an offence to make a statutory declaration that is false in any material particular.

|  |  |  |  |
| --- | --- | --- | --- |
| *Declared* ***at*** ***this day of 20***Before me: |  |  |  |
| ***Signature of declarant*** |
|  |  |  |  |
| ***Signature of witness (over age of 18 years)*** |  |  |  |
|  |  |  |  |
| ***Name and contact address or telephone number of witness*** |  |  |  |

NOTE: A person wilfully making a false statement in a statutory declaration is liable to a penalty of $2,000 or imprisonment for 12 months, or both.

**[NEW SOUTH WALES]**

**And I make** this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act* 1900.

|  |  |  |  |
| --- | --- | --- | --- |
| *Declared* ***at*** ***this day of 20***Before me: |  |  |  |
| ***Signature of declaran***t |
|  |  |  |  |
|  ***Signature of person before whom the declaration is made*** |  |  |  |
|  |  |  |  |
| ***Full name, qualification and address of person before whom the declaration is made*** |  |  |  |

And as a witness, I certify the following matters concerning the person who made this declaration (**declarant**):

[\**strike out the text that does not apply*]

1. \*I saw the face of the declarant.
*OR*
\*I did not see the face of the declarant because he/she was wearing a face covering, but I am satisfied that he/she had a special justification for not removing it.

2. \*I have known the person for at least 12 months.
*OR*
\*I confirmed the person's identity using the following identification document:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Identification document relied on
(may be original or certified copy)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Signature of person before whom the declaration is made

 **[QUEENSLAND]**

**And I make** this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act* *1867*.

|  |  |  |  |
| --- | --- | --- | --- |
| *Taken and declared* ***before me at******on the day of 20*** |  |  |  |
| ***Signature of declarant*** |
|  |  |  |  |
| ***Signature of person before whom the declaration is made*** |  |  |  |
|  |  |  |  |
| ***Full name and qualification of person before whom the declaration is made*** |  |  |  |

**[SOUTH AUSTRALIA]**

**And I make** this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1936*.

|  |  |  |  |
| --- | --- | --- | --- |
| *Declared* ***at*** ***this day of 20***Before me: |  |  |  |
| ***Signature of declarant*** |
|  |  |  |  |
| ***Signature of person before whom the declaration is made*** |  |  |  |
|  |  |  |  |
| ***Title of person before whom the declaration is made*** |  |  |  |

**[TASMANIA]**

**I make** this solemn declaration under the *Oaths Act* 2001.

|  |  |  |  |
| --- | --- | --- | --- |
| *Declared* ***at*** ***on 20******Before me:*** |  |  |  |
| ***Signature of declarant*** |
|  |  |  |  |
| ***Justice, Commissioner for Declarations or authorised person*** |  |  |  |

**[WESTERN AUSTRALIA]**

**This declaration** is true and I know that it is an offence to make a declaration knowing that it is false in a material particular.

**This declaration is made** under the *Oaths, Affidavits and Statutory Declarations Act* 2005 at

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_** on **\_\_\_\_\_\_\_\_\_\_\_\_\_** by **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
**Signature of person making declaration**

in the presence of:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
**Signature of authorised witness**

|  |  |
| --- | --- |
| Name of authorised witness: |  |
| Qualification of witness: |  |