# Guidance for Public Construction Procurement in Victoria

These Guidance 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)**.

The **Ministerial Directions for Public Construction Procurement in Victoria** (Directions) and the **Instructions for Public Construction Procurement in Victoria** (Instructions) comprise the mandatory requirements for Victorian public construction. The Directions and Instructions are supported by these non-mandatory Guidance.

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

List of Guidance

| Guidance | Subject |
| --- | --- |
| 1.2 | Guiding principles |
| 1.3a | Application of the Directions and Instructions |
| 1.3b | Defining public construction |
| 1.4 | Exemptions |
| 3.1 | Tender preparation and planning |
| 3.2.1 | Competition and contestability |
| 3.2.2 | Limited Tenders |
| 3.3 | Promoting efficiency in the tender process |
| 3.4 | Tender Notices |
| 3.5 | Tender open times |
| 3.6 | Tender Documentation |
| 3.7 | Evaluation criteria |
| 4.1.1 | Probity – apply public sector values |
| 4.1.2 | Probity – treat tender participants fairly and equally |
| 4.1.3 | Probity – maintain confidentiality of tender participants’ confidential information |
| 4.1.4 | Probity – auditable, accountable and transparent tender and contract management processes |
| 4.1.5a | Probity – identify and manage conflicts of interest |
| 4.1.5b | Probity – commitment from tender participants |
| 4.2 | Managing probity in Public Construction Procurement |
| 5.1 | Forward notices  |
| 5.2  | Publishing details of procurements undertaken |
| 6.1 | Use of Registers and Supplier Panels |
| 7.1 | Contracting requirements |
| 7.2.1 | Compliance with legislative and policy requirements |
| 7.2.2 | Non-Standard Commercial Arrangements |
| 8.1 | Debrief for tender participants |
| 8.2 | Supplier performance and shared reporting regime |
| 8.3 | Complaints |
| 10.1 | Responsibilities of the Accountable Officer |
| 10.2 | Delegation |

The Secretary

Department of Treasury and Finance

1 Treasury Place

Melbourne Victoria 3002

Australia

Telephone: +61 3 9651 5111

Facsimile: +61 3 9651 2062

dtf.vic.gov.au

Authorised by the Victorian Government

1 Treasury Place, Melbourne, 3002

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# Guiding principles

**Public Construction – Guidance 1.2
Effective date 1 July 2018**

**Objective:** To help Agencies understand the principles underpinning the Directions

**Link to Direction:** Direction 1.2 Construction Procurement Principles
**and Instructions**

Summary

The Directions adopt a principles based approach to Public Construction Procurement.

The procurement principles and the more specific construction procurement principles are guiding principles which should be used to help interpret the requirements in the Directions. The principles are not independent obligations.

This Guidance provides details of these principles and the relationship to particular Directions.

Procurement principles

The Directions are part of a broader public governance and accountability framework.

The procurement principles capture fundamental expectations about how public procurement should be conducted. They are consistent with related Victorian Government policies and frameworks as well as those of other Australian jurisdictions. The procurement principles are reproduced below.

When undertaking Public Construction Procurement in line with the Directions, Agencies must act in a way that is consistent with the following principles:

value for money, taking into account:

* the total benefits and costs over the life of the goods, services or works procured;
* environmental, social and economic factors; and
* any risk related to the procurement;

accountability for procurement commensurate with appropriate levels of authority and responsibility;

probity through the application of integrity, ethical behaviour, fairness and transparency in the conduct of procurement processes;

scalability so that procurement governance policies and processes are appropriate and efficient, taking into account the capability of available resources and the complexity of the procurement undertaken.

Construction procurement principles

The construction procurement principles (set out in the following table) expand on the procurement principles and reflect other issues that need to be considered in Public Construction Procurement.

These principles reflect the need to balance the probity expectations facing government with the need to be efficient in the way government interacts with industry when undertaking the procurement of the government’s significant infrastructure program.

These guiding principles should be used to interpret the requirements of the Directions and their intended purpose.

The construction procurement principles are referenced throughout the Directions to help Agencies identify where a principle is particularly relevant to interpreting a Direction.

|  |  |
| --- | --- |
| Construction procurement principles | Directions to which the principles apply |
| Ensuring appropriate competition and contestability when undertaking Public Construction Procurement | 3, 5, 6 |
| Employing the appropriate procurement delivery models and processes taking account of the complexity and value of the project and supplier market capability | 3, 6, 7 |
| Appropriately planning and managing Public Construction Procurement to deliver procurement objectives | 3, 7 |
| Reducing unnecessary burden of Public Construction Procurement for all parties | 3, 6, 7 |
| Encouraging appropriate innovation and responsiveness in the supplier market | 3, 5, 7, 8 |
| Fostering continuous improvement and building appropriate skills and capability in the conduct of Public Construction Procurement | 8, 9, 10 |
| Conducting Public Construction Procurement in an open and transparent manner ensuring defensibility of processes | 4, 5, 9, 10 |
| Treating all tender participants fairly and equally | 3, 4, 8 |
| Conducting Public Construction Procurement in an efficient and timely manner | 3, 6 |
| Undertaking Public Construction Procurement in accordance with relevant legislation, policy, guidance and any mandatory requirements in the Directions | 2 - 10 |

# Application of the Directions and Instructions

**Public Construction – Guidance 1.3a
Effective date 1 July 2018**

**Objective:** To help Agencies work out when the Directions and Instructions apply to a procurement

**Link to Direction:** Direction 1.3 Application of the Directions and Instructions
**and Instructions**

## Summary

The Directions only apply to Public Construction Procurement.

The Directions only apply to certain Agencies.

This Guidance helps Agencies to work out when the Directions apply to a procurement. The key points to consider are:

* Does the procurement activity constitute Public Construction Procurement?
* Does the Agency have to comply with the Directions?
* Is the procurement being undertaken by or on behalf of an Agency that must comply with the Directions?

## Does the procurement activity constitute Public Construction Procurement?

### When the Directions apply

The Directions apply when undertaking Public Construction Procurement.

Public Construction Procurement is defined as:

* processes and requirements that apply to engaging suppliers to perform Works or Construction Services;
* the terms of engagement and contracts used to engage suppliers performing Works or Construction Services; and
* management of engagements for Works or Construction Services and reporting on how suppliers perform when engaged to deliver Works or Construction Services.

Consider three elements when applying this definition:

1. Engagement of a supplier. The Directions apply when an Agency engages the market to provide Works or Construction Services.
2. What is being procured. The Directions apply when an Agency engages the market to obtain either, or both, of:
	* + **Works** whichmeans construction, maintenance, rehabilitation, alteration, extension or demolition of any improvements on land; or
		+ **Construction Services** which means services directly related to delivering Works, including architectural and design services. Construction Services do not include services indirectly related to delivering Works, such as legal advisory services and commercial advisory services.
3. The activity undertaken. The Directions apply when an Agency is performing any of the following activities:
* engaging tender participants from the market through processes such as expressions of interest, tenders and quotations. This includes preparing any documents needed for these processes, and the process of assessing the offers received;
* determining the terms of engagement and contracts used to engage tender participants;
* managing the engagements, including administering contracts;
* reporting on the performance of suppliers; and
* publishing the details of the procurement undertaken.

### When the Directions do not apply

The Directions do not apply to:

* grants;
* investments;
* loans;
* sale by tender, such as land sales;
* hiring of employees;
* transactions where the asset being procured is not a fixed asset acquired by the Agency; or
* acquisition of Works or Construction Services from another public body or government owned entity, except where the public body or government owned entity is a participant in a competitive tender process.

### When it is not clear if the Directions apply

Sometimes it may not be clear and Agencies may have to decide on the most appropriate way to categorise what is being procured and whether it meets the definition of Public Construction Procurement.

Defining Public Construction (Guidance 1.3b) provides more information about the scope of activities that are included or excluded from Public Construction Procurement.

Be sure to document any decisions that categorise whether or not the procurement is Public Construction Procurement and the reasons for that decision.

If the Directions for Public Construction Procurement do not apply to a procurement:

* For Agencies that are [Victorian Government Purchasing Board in-scope entities](https://buyingfor.vic.gov.au/goods-and-services-mandated-agencies) apply the [Victorian Government Purchasing Board Procurement Policies for goods and services procurement](https://buyingfor.vic.gov.au/goods-services-procurement-policies).
* For other Agencies apply the goods and services procurement policies of the Agency.

Once a decision is made, follow the relevant procurement rules consistently throughout the procurement process.

## Does the Agency have to comply with the Directions?

There are two classes of Agencies for the purposes of the Directions:

* + - Agencies that must comply with the Directions directly; and
		- Excluded Entities that are not required to comply with the Directions.

### Agencies that must comply with the Directions

The Directions apply to all Agencies other than those identified as Excluded Entities.

Agencies that must comply with the Directions are the same as those in scope for the Standing Directions 2018 made under the Financial Management Act. The factsheet [Is your Agency subject to the Standing Directions under the Financial Management Act – updated July 2019?](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994s) lists covered Agencies.

### Excluded Entities that are not required to comply with the Directions

The following Agencies are Excluded Entities:

* + - any school council constituted under Part 2.3 of the **Education and Training Reform Act 2006 (Vic)**;
		- any incorporated committee of management, unless the committee is listed in the Instructions;
		- any class B cemetery trust constituted under section 6 of the **Cemeteries and Crematoria Act 2003 (Vic)**;
		- any 'registered unit' as defined in the **Victoria State Emergency Service Act 2005** **(Vic)**; and
		- any 'volunteer brigade' as defined in the **Country Fire Authority Act 1958 (Vic)**.

Note that Excluded Entities must follow any requirements of:

* + - their Portfolio Department (for school councils, incorporated committees of management and Class B cemetery trusts); or
		- the Victorian State Emergency Service, or the Country Fire Authority (for their registered units and volunteer brigades respectively).

## Is the procurement by or on behalf of an Agency that must comply with the Directions?

The Directions apply when:

* + - an Agency is undertaking Public Construction Procurement; or
		- a third party is undertaking Public Construction Procurement on its behalf.

The Directions do not apply to allocating resources within or between government Agencies. Government Agencies in this context includes another public body, government owned entity, local government or the equivalent from the Commonwealth or any other state or territory.

The Directions apply if a government entity is a participant in a competitive procurement process.

Example:

An Agency may determine that the most effective, efficient and economical way to develop engineering drawings (Construction Services) is to use its in-house engineering staff to develop them. The Directions do not apply because there is no Public Construction Procurement.

Procurement undertaken under the following Procurement Models / methods **is covered** by the Directions:

* construction related services;
* construct only;
* design and construct;
* construction management; and
* direct managed.

Procurement undertaken under the following collaborative Procurement Models **is covered** by the Directions, **to the extent that the Directions are not inconsistent with the Victorian Alliancing Policy**:

* early contractor involvement;
* managing contractor; and
* alliance.

Procurement undertaken under the Partnerships Victoria Requirements **is covered** by the Directions, **to the extent that the Directions are not inconsistent with the Partnerships Victoria Requirements**.

Procurement undertaken under the following Procurement Models **is not covered** by the Directions (apply the construction procurement principles as much as possible):

* work undertaken under rail franchise arrangements, unless the arrangement requires the Directions to be applied;
* work undertaken by developers for water companies (including any other work undertaken in addition to statutory requirements while the ground is open); and
* Works or Construction Services undertaken under a Growth Areas Infrastructure Contribution Work-in-Kind agreement, as defined by the **Planning and Environment Act 1987 (Vic)**.

Example

In the case of works-in-kind undertaken under the Growth Areas Infrastructure Contribution, the value of these works should be benchmarked against equivalent works to ensure value for money and documented to ensure transparency and defensibility. The works must comply with relevant standards and the Accountable Officer needs to be satisfied with the arrangement.

Where procurement is undertaken under the Victorian Alliancing Policy or the Partnerships Victoria Requirements, the components of the Directions and Instructions noted in the following table apply.

|  |  |
| --- | --- |
| Directions and Instructions | Policy framework applying |
| 1.2 | Guiding principles | Ministerial Directions |
| 2 | International Agreements | Ministerial Directions |
| 3.1 | Tender preparation and planning | Ministerial Directions |
| 3.2 | Competition and contestability | Number of tender participants and their selection is determined by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 3.3 | Promoting efficiency in the tender process | Ministerial Directions |
| 3.4 | Tender Notices | Format and timing of notices is determined by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 3.5 | Tender open times | Timing of tenders is determined by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 3.6 | Tender Documentation | As required by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 3.7 | Evaluation criteria | As required by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 4.1 | Probity requirements | Ministerial Directions |
| 4.2 | Managing probity in Public Construction procurement | Ministerial Directions |
| 5.1 | Forward notice | Format and timing of notices is determined by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 5.2 | Publishing details of procurements undertaken | * Projects under Partnerships Victoria Requirements– as required by the Partnerships Victoria Requirements
* Projects under the Victorian Alliancing Policy – Ministerial Directions
 |
| 6.1 | Use of Registers and Supplier Panels | Number of tender participants and their selection is determined by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 7.1 | Contracting requirements | As required by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 7.2 | Contractual terms and conditions | As required by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 8.1 | Debrief for tender participants | Communication with participants is determined by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 8.2 | Shared reporting regime | As required by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 8.3 | Complaints | As required by either the Victorian Alliancing Policy or the Partnerships Victoria Requirements |
| 9 | Standards | Ministerial Directions |

## Useful resources

Guidance 1.3b Defining Public Construction

Helps practitioners work out if a procurement is Public Construction Procurement. Includes examples of matters noting whether they are subject to the Directions.

Victorian Alliancing Policy

Sets out policy and approvals requirements that apply to alliance contracts.

[Partnerships Victoria Requirements](https://www.dtf.vic.gov.au/infrastructure-investment/public-private-partnerships)

Sets out policy and approvals requirements that apply to public private partnership contracts.

# Defining public construction

**Public Construction – Guidance 1.3b
Effective date 30 December 2018**

**Objective:** To help practitioners work out if a procurement is public construction

**Link to Direction:** Direction1.3 Application of the Directions and Instructions
**and Instructions**

## Summary

This guidance sets out examples of matters which:

* meet the definition of public construction,
* may potentially be included in the definition of public construction; and
* are not included as public construction

## Defining public construction

The Ministerial Directions apply to procurement of ‘public construction’, which is a term defined in the **Project Development and Construction Management Act 1994** as:

‘any matter relating to the construction, maintenance, rehabilitation, alteration, extension or demolition of any improvements on land by, or on behalf of, departments or public bodies and includes:

* design and construction practices;
* tendering processes;
* project delivery; [and]
* contract administration.’

Taken literally, the words ‘any matter relating to’ in this definition mean the Directions could apply to almost anything with a connection to improvements made to land. However, practitioners generally take a more practical view, to avoid perverse outcomes in the application of the rules.

When it is unclear if a procurement falls within the definition of public construction, practitioners will need to make a judgement on the most appropriate way to categorise their procurement. This may mean that in some situations the Directions are the most appropriate rules for that procurement, while in others the Victorian Government Purchasing Board policies will be used. In all cases, the overarching principles set out in the Standing Directions 2018 made under the Financial Management Act apply.

Advice should be sought in the first instance from the area responsible for procurement within the Agency to ensure a consistent application of the requirements within the Agency’s internal governance frameworks, when it is unclear if a procurement falls within the definition of public construction.

If further information is required, the Construction Policy Unit within the Department of Treasury and Finance can provide additional advice to help determine whether the procurement is public construction.

The [Victorian Government Purchasing Board](https://buyingfor.vic.gov.au/victorian-government-purchasing-board-vgpb) can provide advice for goods and services procurement.

All decisions about whether or not a procurement is ‘public construction’ and the reasons supporting the decision should be clearly documented.

Once a decision is made, the applicable rules should be followed consistently throughout the procurement process.

## Applying the definition of public construction

Some types of procurement that are relatively easy to classify as public construction, In practice, however, there are a many matters that are more difficult to classify.

The following general questions may help practitioners determine whether a procurement which may meet the definition of public construction should be classified as a ‘public construction’:

* If the procurement is for a package of goods or services, some of which are public construction and others that are not, what is the primary and predominant focus of the procurement and are goods or services required for the project acquired under the same contract?
* Does the procurement have an obvious physical impact on land or an improvement to land, for example does it alter the land or physical structures on it?
* What contractual terms are most appropriate for the procurement, for example is there a site that must be managed? What warranties are needed from the supplier?
* Is the procurement covered by a mandatory State Purchase Contract, such as financial advisory services, probity or legal services? If so, then the State Purchase Contract applies.
* Are the costs associated with the procurement classed as asset expenditure or output (operational) expenditure for financial reporting purposes? Practitioners should note that while this may be helpful in some situations, it is not a determinative assessment as not all asset expenditure is public construction, for example rolling stock or information communication and technology equipment.

Activities commonly raised for clarification are listed and the underlying thinking leading to the classification are presented to support consistency in the interpretation of what is considered public construction procurement.

Examples of matters are set out which:

* are clearly included as public construction,
* may potentially be included as public construction; and
* are not included as public construction.

## Examples of matters which meet the definition of public construction

### Building and construction-related services

Professional services such as:

* architectural services;
* engineering design;
* surveying;
* construction and project management.

Note: services covered by State Purchase Contracts must be procured in accordance with the State Purchase Contracts. For example, legal advice for the purpose of delivering a construction project must be procured under the State Purchase Contract.

### Preparatory works

Preparatory works, including:

* excavation and grading;
* demolition;
* drainage;
* earthworks;
* foundations;
* fencing;
* geotechnical investigations;
* site clearing; and
* scaffolding.

### Building and construction works

Works, such as:

* bricklaying;
* erecting frames and walls;
* concreting;
* carpentry;
* flooring;
* tiling;
* plumbing; and
* roofing / guttering.

Installation of fittings, such as:

* electrical wiring;
* heating;
* ventilation;
* power supply;
* drainage; and
* fire protection.

Civil works, including:

* roads;
* bridges;
* sewers;
* pipelines;
* railways;
* industrial plant;
* bores;
* dredging; and
* retaining walls.

### Temporary structures that require construction works for their installation or use

Temporary structures that require construction works for their installation. The construction works may include earthworks, footings, drainage and installation of utilities as needed for the use of the temporary structure.

### Supply of goods, where the goods are intended for incorporation into a project

The supply of construction goods, whether in advance of a project, or directly supplied by the principal during a project, intended for installation into a project. In this case, there is a direct connection between the goods purchased and a project. Examples include the supply of railway sleepers or pipes intended for a specific project, to ensure availability of the goods at the required time.

## Examples of matters which meet the definition of public construction depending on the particular circumstances of the procurement

### Maintenance

Maintenance’ is included in the **Project Development and Construction Management Act 1994** definition of ‘public construction’; however practitioners define ‘maintenance’ differently.

The key link in the **Project Development and Construction Management Act 1994** definition is that the maintenance must be ‘on the improvement to land’, that is the fixed asset.

Where maintenance is focused on the physical structure and fixtures, it is covered by the definition of public construction. Examples include structural repairs, lifecycle items, repairs that extend the life of the structure.

Where maintenance is of non‑fixed items, even where these have been installed as part of an initial construction project or constitute capital expenditure for financial reporting purposes, the Victorian Government Purchasing Board policies may be more appropriate. Examples include changing light globes, servicing of removable air conditioning units (as opposed to ventilation systems), and repairs to modular furniture.

Maintenance activities may be covered by a broader facilities management agreement. For example, a contract which covers provision of general cleaning, gardening and security services may also include minor works such as repairing broken windows, which would ordinarily be considered public construction.

When determining if a procurement that bundles a number of maintenance activities together is public construction, practitioners should focus on the:

* predominant purpose of that contract; and
* potential impact of the activities on the land or building where the activities are being undertaken.

### Information communication and technology

Installation of information communication and technology may be included as part of package of works. Activities within that package may include public construction. Examples include cabling behind walls, signs on freeways or installation of networks in office space.

The ongoing operation of and upgrades to information communication and technology infrastructure may not constitute ‘public construction’ where it is focused on the operation of the system, rather than maintenance of, or upgrades to, the built components.

When determining if a procurement of information communication and technology is public construction, practitioners should consider the predominant purpose of the procurement, noting:

* Software development services are covered by the e‑services register and are not public construction.
* Where an information communication and technology system includes both installation of ‘hard’ components (such as wiring) in addition to provision of the software, consider the predominant purpose of the procurement and whether the built component is incidental to the procurement of the software.

### Interior design and fit out

Interior design and physical fit-out is often included in a package of works for a building or construction project.

When interior design and fit-out is undertaken after the initial build, to determining whether the work constitutes public construction practitioners should consider:

* the nature of the fit‑out and works being undertaken;
* whether it is an improvement to land; and
* whether the physical fit-out is the primary purpose of the procurement or whether it is incidental.

Where painting is undertaken as part of a broader package of works, it should be procured as part of the package. However, procuring painting on its own, depending on its scale and method, might or might not be construction.

A wall, even a moveable wall, forms part of a building. In contrast, an unattached workstation, for example modular furniture, may be more properly considered a supply of goods. Whether the works are a more permanent alteration to a building due to the scale of works should be considered.

Carpeting undertaken alongside carpenters, floorers, electricians, and the like. in a whole building is likely to be ‘public construction’, whereas replacing a carpet in a single room may be a supply of goods.

Tables and chairs may be procured as part of a works package when an initial fit‑out is undertaken, but subsequent procurements may be more appropriately handled under the Victorian Government Purchasing Board policies.

### Landscaping

Where landscaping is undertaken alongside the design and execution of a building or construction project, it is ‘public construction’. However, ongoing maintenance of landscaped areas may not be.

For example, general gardening activities, such as clearing leaves and lawn mowing, may be considered more akin to cleaning on some sites, whereas others, such as a road reserve, may be more properly classified as maintenance of the improvement to land, as this work is critical for preserving the built infrastructure.

Practitioners should consider:

* the nature and scale of the landscaping works being undertaken;
* the equipment required to undertake the works; and
* how the works relate to and impact on the physical asset.

## Examples of matters which do not meet the definition of public construction

The definition of Construction Services includes services **directly** related to the delivery of Works, including architectural and design services. It does not include services **indirectly** related to the delivery of Works, including legal advisory services and commercial advisory services.

It is important to consider this distinction when determining if the Directions apply to a procurement.

The following examples set when services may be **indirectly** related to the Works and the Ministerial Directions do not apply.

### Goods with no installation

Procurement of goods for the purpose of operating a building, even where the initial procurement may have been part of a package of works covered by the Directions, is likely to be covered by the Victorian Government Purchasing Board policies, where the goods are not supplied with any installation component.

Where there is an installation component (as for information communication and technology), practitioners should consider whether the installation is incidental or a primary feature of the procurement. If installation is a major element of the procurement, then the Directions may be more appropriate.

### Services that do not impact on physical structure

Services that do not impact on a physical structure of a building are covered by the Victorian Government Purchasing Board supply policies. For instance, provision of ‘soft services’ under a facilities management contract are most appropriately dealt with under the Victorian Government Purchasing Board supply policies, even though they are linked to the operation of a building, for example security services, reception services and catering.

Services such as couriers, real estate services, legal services and business case planning, may be used to facilitate the completion of a building or construction project and included in a project budget. However, these services should be procured under Victorian Government Purchasing Board supply policies, including State Purchase Contracts and mandatory panels where applicable.

There may be instances where suppliers, who normally provide Construction Services, are engaged to provide non‑construction advice, which is unrelated to alterations to a physical asset, such as business planning. In these cases, the Victorian Government Purchasing Board rules may be more appropriate for the procurement.

### State Purchase Contracts

State Purchase Contracts are standing offer agreements for the supply of common use goods and services to the Victorian Government. Some State Purchase Contracts are mandatory depending on the good or service being procured and whether the government entity is an in‑scope entity for the purposes of the Victorian Government Purchasing Board.

Practitioners should note that State Purchase Contracts apply for a number of services relevant for public construction projects such as probity advisers, commercial and financial advisory services and legal advisers who advise on transaction planning, structuring and documentation.

The rules governing the application of these State Purchase Contracts must be followed in the context of public construction projects.

### Cleaning

Although cleaning generally falls under the Victorian Government Purchasing Board policies, site cleaning as part of completion of a building or construction project, is considered public construction and is covered by the Directions.

In some circumstances there may be overlap between ‘cleaning, such as the removal of graffiti, and ‘maintenance’, such as where graffiti removal is included in a package for maintenance of an improvement to land.

### Temporary structures that do not require construction works for their installation or use

Temporary structures that do not require construction works for their installation are similar to goods without installation and are better covered by the Victorian Government Purchasing Board policies, as the supply of goods without installation. An example is a flat pack greenhouse that does not require works for its installation or use.

### Supply of goods, to be held in a depot or store

The supply of construction goods not intended for installation into a project. In this case, there is a no direct connection between the goods purchased and any project. Examples include the supply fixtures and fitting held in a depot or store for general use, even if with later use they are incorporated into Works.

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| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | Examples of matters that meet the definition of public construction | Insert new paragraph Temporary structures that require construction works for their installation or use.Insert new paragraph Supply of goods, where the goods are intended for incorporation into a project. | DTF |
| 1 | 30/12/2018 | Examples of matters that do not meet the definition of public construction | Insert new paragraph Temporary structures that do not require construction works for their installation or use.Insert new paragraph Supply of goods, to be held in a depot or store. | DTF |

# Exemptions

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

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

**Link to Direction:** Direction 1.4 Exemptions
**and Instructions** Instruction 1.4 Exemptions

## Summary

The Assistant Treasurer, as the minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**, may approve exemptions from specific or all requirements in the Directions or the Instructions.

The Secretary to the Department of Treasury and Finance may approve exemptions from specific or all requirements in the Instructions when an application for exemption applies only to the Instructions.

This Guidance describes what to include in an application for exemption and the factors that will be considered when assessing applications for exemption.

## Preparing to apply for an exemption

The Directions provide a principles-based, outcomes focused framework to support good procurement practice.

The principle of scalability allows the Directions and Instructions to be applied flexibly, in a way that is proportionate and appropriate to an Agency's procurement profile.

While having an exemption process is necessary, few exemptions will be warranted.

### What types of exemption may be applied for?

An exemption may:

* be for a specified time period, or be ongoing;
* be for a specific project or class of projects;
* apply to Works or Construction Services;
* relate to specific Directions or Instructions, or to the Directions or Instructions as a whole;
* relate to all or part of an Agency's Public Construction Procurement; or
* apply to a single Agency or to a class of Agencies.

Example

An authority or statutory office created to deliver a particular project or program of Works or Construction Services has a Public Construction Procurement profile that includes only large scale works projects, while the rest of the Agency undertakes works projects of different values.

Applying the Public Construction Procurement framework developed for the Agency to the authority may lead to less efficient, economical or effective procurement activity. This may warrant applying for an exemption to revise the threshold values that apply to Limited Tenders.

When considering the need for an exemption:

* identify the minimum scope of the Directions or Instructions that would apply to the exemption application; and
* ensure that the proposed alternative approach takes account of the purpose of the Directions and the underlying principles listed in Guiding Principles (Guidance 1.2).

### Who should be involved in preparing an application for exemption?

All Agencies should consult with the Construction Policy Unit within the Department of Treasury and Finance before applying for an exemption.

Where the Agency seeking an exemption is a Portfolio Agency, it should first consult with its Portfolio Department before consulting with the Construction Policy Unit within the Department of Treasury and Finance because there may be common issues with other Agencies in the Portfolio justifying a joint application.

Apply sufficient time and resources to develop a strong case for an exemption.

## How to apply for an exemption

### What is the format of an application for exemption?

The format of an exemption is a letter from the Agency’s Accountable Officer or Responsible Minister to the Assistant Treasurer, as the responsible Minister under the Project Development and Construction Management Act 1994 (Vic), where the exemption refers to:

* any of the Directions; or
* any of the Directions in combination with any of the Instructions.

Where an application for exemption refers to the Instructions only, the format is a letter from the Agency’s Accountable Officer or Responsible Minister to the Secretary to the Department of Treasury and Finance.

In both cases, always send a copy of the application letter to the Construction Policy Unit within the Department of Treasury and Finance as well.

### What information is needed in an application for exemption?

Information needed in an application for exemption includes:

* the Directions or Instructions from which the exemption is sought;
* the reasons for seeking the exemption;
* relevant information about the Agency, including size, nature and risk profile of the Agency's procurement, if relevant to the application;
* if the application for exemption refers to a procurement, provide relevant information about the procurement, including its size, nature and risk profile;
* alternative action or procedures that will be adopted to ensure that:
* the objectives of the relevant Directions or Instruction are achieved; and
* the Agency's approach to Public Construction Procurement is undertaken consistent with the principles in Guiding principles (Guidance 1.2); and
* the scope of the exemption sought, whether for:
* a specified time period or on an ongoing basis;
* a specific project or a class of projects;
* specific Directions or Instructions, or to the Directions and Instructions as a whole;
* all or part of an Agency's Public Construction Procurement; and
* the applying Agency or a class of Agencies (if the latter, list the Agencies proposed to be covered by the exemption).

### What information should be provided to support an application for exemption?

An Agency applying for an exemption needs to provide reasons that demonstrate that it has a compelling case for an exemption.

The following information may be provided to support an application for an exemption:

* an explanation of how the exemption and alternative arrangements would support the integrity of the Agency’s Public Construction Procurement activities and the purpose and principles set out in the Directions;
* a description of the effects on the Agency of being granted or being denied the exemption;
* a cost‑benefit analysis, or other analysis, of the exemption; and
* relevant supporting material, such as information about the supplier market.

Demonstrating that the exemption will result in a **clear** **net benefit** to the Victorian community and supplier market may be persuasive. A ‘net benefit’ is an overall positive impact on the community. It takes into account the costs and benefits related to economic impact, financial risks, social and environmental considerations and other matters.

The nature of the Agency’s Public Construction Procurement activities and the supplier market will inform how these benefits are assessed.

## Evaluating and responding to exemption applications

### Who determines the outcome of an application for exemption?

The Department of Treasury and Finance will evaluate exemption applications on a case‑by‑case basis, and make a recommendation to the Assistant Treasurer. The Department may contact an Agency to clarify aspects of an exemption application.

The Assistant Treasurer may approve or reject an application for exemption where the application refers to:

* any of the Directions; or
* any of the Directions in combination with any of the Instructions.

The Secretary to the Department of Treasury and Finance may approve or reject an application for exemption where the application refers to the Instructions only.

### How is the outcome of an application for exemption presented?

The Assistant Treasurer or Secretary to the Department of Treasury and Finance will respond by letter to the Agency.

An exemption may be approved subject to, for example, the Agency:

* implementing an alternative action or procedures;
* providing an annual assurance that there has not been any significant change to the Agency’s procurement profile, procurement risk profile and functions, or a relevant adverse audit finding.

The exemption approval may be revoked if the Agency does not comply with a condition to an approval.

## After receiving the results for an application for exemption

Implement the proposed alternative action or procedures immediately after receiving the approval for the exemption.

Maintain a register to record:

* applications for exemption;
* the date when an application was submitted;
* the outcome of the application, whether approved, rejected or approved subject to conditions; and
* if an exemption was approved subject to conditions, the conditions applying to the approval.

The register of exemptions must be made available for inspection by external oversight bodies.

# Tender preparation and planning

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

**Objective:** To help Agencies in undertaking tender planning

**Link to Direction:** Direction3.1 Tender preparation and planning
**and Instructions** Direction3.1 Tender preparation and planning

## Summary

Good preparation and planning are key elements of conducting an effective and efficient tender process and project delivery.

Think about tender planning as an activity directed at an outcome, rather than just completing a template.

The way the Directions and Instructions are applied is intended to be scalable, recognising the risk profile, nature and complexity of the procurement.

Consistent with the principle of scalability, the level of detail and extent of documentation should match the risk and complexity of the procurement.

This Guidance outlines key content that should be addressed and documented as part of tender planning and preparation. This will guide the tender process from tender development to contract award and also applies to project delivery and contract management.

## Undertake appropriate planning process

There is no one-size-fits-all approach to tender preparation and planning. The amount of preparation required for individual projects will differ according to factors such as the scale and complexity of the project.

The focus of tender planning is to ensure that the following elements are considered at the appropriate time:

* identifying clear procurement objectives;
* appropriate market sounding and engagement strategy;
* tender strategy;
* key dates and time periods during the tender process;
* tender evaluation and evaluation process;
* management of probity;
* contract management; and
* governance and resourcing.

Tender preparation and planning should build on the:

* project plan or asset management strategy developed under the [Asset Management and Accountability Framework](http://www.dtf.vic.gov.au/Investment-Planning-and-Evaluation/Understanding-investment-planning-and-review/What-is-asset-management); and
* procurement strategy and business case, where a project is subject to the [Investment Lifecycle Guidelines](https://www.dtf.vic.gov.au/infrastructure-investment/investment-lifecycle-and-high-value-and-high-risk-guidelines).

This Guidance identifies a range of preparation and planning considerations and documents that may be developed. The nature and complexity of a procurement will indicate whether the response may be:

* a few lines in a project plan; or
* topic specific documents such as a procurement plan or contract management plan.

Appropriate records (see Auditable, transparent and accountable tender and contract management processes (Instruction 4.1.4) should be maintained to document the outcome of the tender preparation and planning process.

### Uncomplicated projects

For straight forward projects, preparation and planning may follow the Agency’s standard documents and processes.

### Complex and unique projects

For more complex projects, individualised and detailed preparation processes may be required, in addition to an Agency’s standard documents and processes.

Examples where more detailed planning may be required include:

* where a different Procurement Model is needed to deal with the individual features of a project;
* a project of a scale not previously procured;
* a sensitive project with an active stakeholder group; or
* an environmentally sensitive project that may require ‘real option’ decisions under certain circumstances.

## Elements of tender planning and preparation

### Identifying clear procurement objectives

Clear procurement objectives are fundamental to:

* defining what you are asking the market to provide; and
* assessing value-for-money.

Procurement objectives come from different documents depending on the characteristics of the project:

|  |  |
| --- | --- |
| Project characteristic | Source of objectives |
| Uncomplicated projects | Internal funding approval documentsAnnual asset management plan |
| Complex, high value or unique | The project business caseDetailed project benefits analysis |

A project brief is usually developed to define the scope of the project. The project brief should also define:

* the objectives of the project;
* the procurement objectives for the project;
* project stakeholder requirements (including functional goals, performance, technical criteria and completion dates or term date requirements); and
* any known constraints associated with the delivery of the project, for example public access requirements and availability of land.

### Market analysis, market sounding and engagement strategy

Understanding the nature of the supplier market and developing a strategy for market engagement is important for ensuring competition and contestability. Consider the target market for the procurement and the best way to reach potential tender participants.

A forward procurement notice (see Forward notices (Guidance 5.1) is required for open and Selective Tenders. Include planning for the forward notice in the market engagement strategy.

The market engagement strategy should consider the characteristics of the project:

|  |  |
| --- | --- |
| Project characteristic | Elements of market analysis strategy |
| Uncomplicated projects | Relatively simple process such as:* identifying the relevant websites / publications to advertise a procurement; or
* determining categories on a Register.
 |
| Complex high value or unique | Process may start many months in advance of a Tender Notice and may include:* briefings to market participants;
* a supply market analysis;
* a market identification process that involves soliciting interest from market participants;
* project scoping and a demand analysis review; and
* delivery planning to determine the optimal market approach and engagement strategy.
 |

### Purpose of the tender strategy

The tender strategy documents the:

* scope of works;
* project staging and structuring including timing and interface risks;
* tender approach; and
* form of invitation to tender.

The tender strategy:

* would normally be part of the broader procurement strategy;
* is scalable; and
* may be based on standard tender strategies for particular types of procurements.

### Key dates and time periods during the tender process

These Directions aim to reduce the burden on tender participants. One way to do this is through more efficient planning and managing of procurements. Tender participants need to understand when resources will be needed for a tender process and subsequently project delivery as part of their business planning.

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 notices and Tender Documentation to the market;
* time period for tender participants to submit a response;
* evaluation period;
* time to obtain relevant approvals both internally and from other Agencies; and
* time required for the Agency to obtain any external approvals.

Tender planning and the timing of procurements will vary according to circumstances. Review the planned dates as the procurement progresses, but aim to work to the planned dates as much as possible.

Aim to adhere to time periods communicated to tender participants during:

* tender open periods; and
* tender evaluation periods.

Factors to consider when determining the time period for tender participants to submit a response are described in Tender open times (Guidance 3.5).

### Tender evaluation process

Effective planning of the tender evaluation allows Agencies to:

* better link the evaluation criteria to the procurement objectives;
* consider and plan how the evaluation criteria will be assessed;
* consider the most efficient way to assess different stages of a multi-stage procurement and aim to avoid re-evaluating the same criteria;
* determine the information needed to evaluate responses;
* ensure information requested from tenderer participants is relevant for determining the outcome of the tender process (at the stage it is requested);
* plan the resources required to evaluate the tender submissions; and
* more efficient procurement outcomes, through targeted and relevant evaluation criteria, and fewer requests for unnecessary information.

The evaluation plan should describe:

* the evaluation criteria;
* whether the evaluation criteria are mandatory or ranked;
* information needed to assess the criteria;
* how the evaluation process will be undertaken, such as tender staging or the use of shortlists;
* the expected timeframe for the evaluation; and
* the resources required for the evaluation.

Evaluation criteria (Direction 3.7) requires the evaluation plan to be:

* substantially complete before the Tender Documentation is released; and
* finalised before the tender closing date.

The evaluation plan may take the form of:

|  |  |
| --- | --- |
| Project characteristic | Format for evaluation plan |
| Uncomplicated projects | Agency standard document of general application |
| Complex high value or unique | * Agency standard document specific to a procurement category; or
* Project-specific plan.
 |

Types of evaluation criteria are described in Evaluation criteria (Guidance 3.7).

### Managing probity

Probity is a fundamental principle of Victorian Government procurement. Probity is addressed directly through the principles and requirements listed in:

* Guiding Principles (Guidance 1.2) – general procurement principles and more specific construction procurement principles
* Probity requirements (Direction 4.1) and Probity requirements (Instruction 4.1).

Probity is a relevant consideration for all procurement and should be actively considered throughout the process to address changing circumstances.

Probity planning should ensure the procurement strategy and plans can be implemented effectively. If a tender strategy requires collaboration with tender participants, probity planning should enable planned collaboration rather than inhibit it.

A probity plan must be prepared for projects:

* with an estimated value over $10 million (inclusive of GST); or
* that are complex or otherwise high risk.

The content of a probity plan is described in Managing probity in Public Construction Procurement (Instruction 4.2).

Probity planning documentation may take the following forms:

|  |  |
| --- | --- |
| Project characteristic | Probity planning documentation |
| Uncomplicated projects | Use Agency standard processes, such as:* conflict of interest management; and
* the requirements of the [Public Sector Values](https://vpsc.vic.gov.au/ethics-behaviours-culture/public-sector-values/) and [Victorian Public Sector codes of conduct](https://vpsc.vic.gov.au/resources/code-of-conduct-for-employees/).
 |
| Complex high value or unique | Specific probity documentation, comprising either:* a probity plan for a procurement category, prepared as an Agency standard document; or
* a project-specific probity plan.
 |

### Contract management

Contract management planning involves considering how the contract will be managed once it is in place. Early planning ensures that proper consideration is given to how the contract will be managed from the outset and not only following the award of the contract.

Contract management planning:

* should first occur during the procurement or project planning phase;
* is usually refined during contract formation activities; and
* may continue throughout the period of the contract to reflect changing circumstances.

There is no standard form for contract management planning. Issues to consider include:

* background - the procurement process that led to the contract;
* details of the contracting parties - information about both parties (the Agency and the supplier) and who is authorised to issue and respond to notices and initiate contract variations;
* details of major stakeholders, noting the stakeholders’ reason for interest in this contract (note any intra-agency relationships);
* contract details summary - a summary of the information contained in the contract;
* contract management strategy - the objective and methods or procedures to be followed and references to and location of any useful source documents; and
* document register- an up-to-date list of all relevant documents (including their purpose, current version/amendment status, location and a synopsis).

Contract management planning documentation may take the following forms:

|  |  |
| --- | --- |
| Project characteristic | Contract management planning documentation |
| Uncomplicated projects | Use Agency standard processes, such as:* procurement approvals;
* expenditure approvals;
* conflict of interest management;
* records management; and
* the requirements of the [Public Sector Values](https://vpsc.vic.gov.au/ethics-behaviours-culture/public-sector-values/) and [Victorian Public Sector codes of conduct](https://vpsc.vic.gov.au/resources/code-of-conduct-for-employees/).
 |
| Complex high value or unique | Specific contract management planning documentation, comprising either:* a contract management plan for a procurement category, prepared as an Agency standard document; or
* a project-specific contract management plan.
 |

### Governance and resourcing

Consider governance and resourcing requirements throughout the delivery of a procurement process. Resourcing and skills requirements will change through the procurement phases.

Example

Different skills will be required for development of plans, tender documents and specifications; evaluation committees and contract negotiation; and contract management.

Governance and resource planning may take the following forms:

|  |  |
| --- | --- |
| Project characteristic | Governance and resources planning |
| Uncomplicated projectsProjects listed in an Agency's annual asset management plan | Refer to the relevant team assigned to the project with standing internal project governance arrangements. |
| Complex high value or unique | Specific governance and resource planning, comprising either:* governance and resource planning for a procurement category, prepared as an Agency standard process; or
* project-specific governance and resource planning.
 |

## Useful resources

[Efficiencies in Major Project Procurement Benchmarks for Efficient Procurement of Major Infrastructure, Volume 1 Benchmarks for Efficient Procurement of Major Infrastructure](https://www.infrastructureaustralia.gov.au/publications/efficiencies-major-project-procurement-volume-1-benchmarks-efficient-procurement-major-infrastructure) (Infrastructure Australia, June 2012)

Identifies efficiency benchmarks for best practice procurement of major infrastructure and describes timeframes for large-scale infrastructure projects.

[Towards agreed expectations: Tender strategies to improve Design and Construct Infrastructure Delivery Outcomes](https://infrastructure.gov.au/infrastructure/publications/files/Towards_agreed_expectations.pdf) *(*Commonwealth of Australia Department of Infrastructure and Transport, June 2012)

Describes tender strategies to improve Design and Construct infrastructure delivery outcomes.

[National Framework for Traditional Contracting: The Guide Good Practice and Commercial Principles for Traditional Contracting](https://infrastructure.gov.au/infrastructure/ngpd/files/NFTC_The%20Guide.pdf) (Department of Infrastructure and Regional Development, September 2015)

Describes strategies to engage the market in the most effective and efficient way.

[National Framework for Traditional Contracting: Topic Specific Guide 1 Project Definition and Tendering](https://infrastructure.gov.au/infrastructure/ngpd/files/NFTC_TSG1_Project_Definition.pdf) (Department of Infrastructure and Regional Development, September 2015)

Identifies the principles and practices that support developing the project definition.

[Market Analysis and Review – Goods and services procurement guide](https://buyingfor.vic.gov.au/market-analysis-and-review-goods-and-services-procurement-guide) (Victorian Government Purchasing Board, 2015)

Outlines ways to assess the ability of the market to supply the works or services required in a procurement.

[Investment Lifecycle Guidelines, Stage 2 Procurement](https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-2-procurement) (Department of Treasury and Finance, 2019)

Discusses how to develop a tender strategy and procurement plan.

[Investing under uncertainty Real options analysis technical supplement](https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-1-business-case) (Department of Treasury and Finance, 2018)

Discusses how to deal with procurements involving uncertainty – using real options.

# Competition and contestability

**Public Construction – Guidance 3.2.1
Effective date 2 August 2019**

**Objective:** To help Agencies to achieve appropriate/efficient levels of competition

**Link to Direction:** Direction 3.2 Competition and contestability
**and Instructions** Instruction 3.2 Competition and contestability
 Direction 2 International Agreements
 Instruction 2.1 Complying with International Agreements

## Summary

Agencies should select suppliers using processes that achieve an appropriate level of competition and contestability.

Select the most appropriate tender method to balance competition with efficiency and reducing the burden on tender participants, and the need to use scalable procurement methods that are appropriate for the complexity and value of the project and market capability.

Three types of tender process that may be used for Public Construction Procurement are open tender, Selective Tender and Limited Tender.

The circumstances when Limited Tenders, where competition is restricted or absent, maybe used are set out in Competition and contestability (Instruction 3.2).

This Guidance sets out what to consider when choosing the best way to engage the market, in tender staging and when thinking about the size of the tender field to achieve an appropriate level of competition.

This Guidance should be read in conjunction with Promoting efficiency in the tender process (Guidance 3.3) which focuses on considerations for conducting processes efficiently and reducing the burden of tendering.

## Balancing competition with reducing the burden on tender participants

Competition and contestability are key principles in Public Construction Procurement and provide the best way of achieving value for money.

When choosing suppliers, Agencies should use processes that achieve an appropriate level of competition and contestability, taking account of:

* the nature and complexity of the Works or Construction Services;
* the structure of the tender process and the Procurement Model, and
* the dynamics of the supply market and interest among potential tender participants.

## Selection of the most appropriate tender method needs to:

## balance competition with efficiency and reducing the burden on tender participants;

## use scalable procurement methods that suit the complexity and value of the project; and

## respond to the capability of the market to provide the Works or Construction Services.

For Agencies that need to comply with International Agreements, structuring a tender process needs to ensure compliance (see Complying with International Agreements (Instruction 2.1).

## Open tenders

Open tender processes involve an open invitation to all potential participants to submit a proposal via a public notice or advertisement.

Any tender participant that considers they meet the evaluation criteria may submit a response and participate in the tender. Open tenders are an effective way to reach the broadest possible group of qualified tender participants.

An open tender may not achieve the best outcome when there are many potential tender participants. A high number of potential competitors can dissuade potential tender participants, because the odds of being successful may be too low.

Consider the most appropriate way to structure an open tender, in particular whether a single or multi-stage process is appropriate.

## Selective Tenders

In Construction Procurement, a Selective Tender means a competitive tender open only to suppliers on a prequalification Register.

A Selective Tender may be conducted either as an invitation:

* to all tender participants in the relevant category on a Register; or
* to selected tender participants, (where at least three tender participants in the relevant category on a Register are invited).

Agencies may choose which type of Selective Tender is most appropriate for their procurement, balancing the principles of competition and efficiency. This should consider:

* the number of tender participants qualified in the relevant category;
* market interest in the procurement;
* the cost to tender participants in preparing a response; and
* ways to reduce unnecessary transaction costs to all participants.

Selective Tenders offer efficiency benefits by:

* providing competition, while not burdening all potential participants; and
* reducing transaction costs by providing a process where responses to common evaluation criteria are assessed in advance of an actual procurement, avoiding repetition.

However, Selective Tenders create potential risks:

* the choice of the selected tender participants and the number of participants selected may be seen to be unfair; and
* selecting from a Register limits the opportunity for consortia to bid, because consortia are generally formed on a project specific basis. (Consortia are one-off arrangements formed for a specific procurement, therefore a consortia would not appear in a Register.)

Ensure that the selection of tender participants from a Register and the number of tender participants selected is defensible. Document the reasons for any selection.

Any selection process needs to be based on fairness. For example, the selection may be determined on merit based on past performance, or on providing equitable opportunity by inviting all tender participants in the relevant category on a Register to express interest in a procurement.

## Limited Tenders

Limited Tenders are most appropriate where competition is restricted or absent. The circumstances under which Limited Tenders could be used are set out in Competition and contestability (Instruction 3.2). Further discussion is provided in Limited Tenders (Guidance 3.2.2).

## Tender staging and field size

Staging a tender and determining an appropriate field size for a procurement are ways to improve the efficiency of a procurement while maintaining competition.

Tender staging involves undertaking the procurement over a number of stages, with the number of potential participants reducing as the stages progress. The first stage usually involves either open competition or open expressions of interest from a relevant category in a Register.

Agencies may use multi-stage procurement processes when conducting open or Selective Tenders. When conducting a multi-stage procurement process for a Selective Tender, the initial invitation stage may be either open or selective. For clarity, the requirement to use a Forward Notice set out in Forward notices (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.

Single stage procurement is often used for Limited Tenders or Selective Tenders, because the number of participants invited to submit a response is small.

Example

An Agency decides to call an open tender for a Works project. As it expects considerable interest in the tender, it decides to use a multi stage process to filter the number of participants - the first stage being an expression of interest and the second stage being invitations to submit responses.

In the Tender Documentation at the expression of interest stage the Agency advises that it intends to use a shortlisting process, inviting four suppliers to submit offers to undertake the Works. Evaluation criteria used at this first stage include capability to complete the Works, capacity to meet the project timelines and proof that a participant holds registration as a Registered Builder in Victoria.

In response to the first stage expression of interest the Agency receives 12 responses.

The Agency evaluates the expressions of interest and determines which four participants will be invited to submit responses.

Field size is the number of participants competing in a procurement, or a stage of a procurement.

Generally, the number of tender participants invited should be between three and six. The recommended field size applies to:

* the second (or later) stage of an open tender;
* the direct selection of potential tender participants from a Register; as part of a Selective Tender;
* the second (or later) stage of an expression of interest offered to all prequalified suppliers from a category of a Register, as part of a Selective Tender;
* a Limited Tender, where the value of the Works is expected to be more than $50,000 (inclusive of GST) but less than $500,000 (inclusive of GST); or
* a Limited Tender, where the value of the Construction Services is expected to be more than $50,000 (inclusive of GST) but less than $200,000 (inclusive of GST).

For large or design-led tenders, the number of tender participants invited to prepare project-specific tenders should be limited to a maximum of four. This recommended field size applies to either:

* the tender participants invited under a Selective Tender; or
* the maximum size for a short list in a multi-stage procurement.

In major projects with complex and expensive tender requirements (such as public private partnerships or alliancing projects), a field size of two maybe sufficient.

For smaller construct-only projects, the field size should be limited to a maximum of six - for example where the Tender Documentation includes a Bill of Quantities (a measured list of the materials needed for the Works).

In determining whether to seek more than the minimum number of tender participants consider any competitive benefit that could be achieved from a larger field against factors such as the:

* + - time and cost of preparing and evaluating tenders;
		- complexity of the project;
		- project delivery method;
		- structure of the supply market; and
		- interest among potential tender participants.

## The benefits of a flexible approach

The planning process should enable Agencies to build a productive relationship with suppliers in the relevant market.

A program of works could justify establishing a Supplier Panel following a competitive tender process to provide a ready source of suitable participants to support multiple related procurements.

The breakdown of the procurement into packages provides the opportunity to have more participants engaged to provide Works or Construction Services. For example, few major contractors operate in regional areas, so dividing a large project into several smaller projects may give local participants a greater opportunity to compete for a project.

Lack of interest in an expression of interest or market testing exercise can be an indicator that the procurement strategy needs to be revisited. Any change should be undertaken carefully. For example, breaking the project into smaller work tasks may increase the number of potential participants, but may also add to integration risks between the smaller projects and increase the contract management task.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 24/07/2018 | Tender staging and field size | Insert new paragraph clarifying use of multi-stage procurement processes when conducting open or Selective Tenders. | DTF |
| 2 |  2/8/2019 | Tender staging and field size | In the paragraph starting ‘In major projects with complex and expensive tender requirements (such as public private partnerships or alliancing projects), a field size of two maybe sufficient’, remove the reference to consider partially compensating tender participants. Victoria’s bid cost reimbursement for major construction projects policy replaces this reference. |  |

# Limited Tenders

**Public Construction – Guidance 3.2.2
Effective date 1 July 2018**

**Objective:** To help Agencies understand the circumstances under which Limited Tenders can be used

**Link to Direction:** Direction 3.2 Competition and contestability
**and Instructions** Instruction 3.2 Competition and contestability

## Summary

The circumstances when Limited Tenders may be used are set out in Competition and contestability (Instruction 3.2).

In general, non-competitive tender processes for projects with an expected value above $50,000 (inclusive of GST), should be rare.

This Guidance describes the circumstances under which Limited Tenders can be used.

## Limited Tender

Circumstances when a Limited Tender processes may be used:

|  |  |  |
| --- | --- | --- |
| Expected value of the engagement | Form of Construction Procurement | Number of potential participants invited to participate in the Limited Tender |
| Below $50,000 (inclusive of GST) | WorksConstruction Services | A single potential tender participant |
| More than $50,000 (inclusive of GST) but less than $500,000 (inclusive of GST) | Works | At least three potential tender participants |
| More than $50,000 (inclusive of GST) but less than $200,000 (inclusive of GST) | Construction Services | At least three potential tender participants |

Agencies should consider alternative ways to assess value for money when assessing an offer from a single tender participant- for example, comparing pricing across similar projects or applying benchmark rates as a comparison.

In general, non-competitive tender processes for projects with an expected value above $50,000 (inclusive of GST) should be rare. Agencies may only conduct this form of Limited Tender if one or more of the Special Circumstances set out in Competition and contestability (Instruction 3.2) exist and appropriate approvals are obtained.

A Limited Tender process may be used if Special Circumstances justify using less than the specified number of required tender participants. For example, a Limited Tender may be considered if the required number of tender participants is three, but only two potential tender participants have the required skills.

The challenge is to conduct the procurement with competitive pressure to achieve value for money without creating an unproductive workload for potential tender participants and the Agency itself. The approval for use of a Limited Tender should set out the alternative approach proposed in conducting the Limited Tender, so that any departures from the normal requirements are clearly documented and compliance with the principles is maintained as far as practicable.

## Special Circumstances – understanding what they mean

Special Circumstances may be used to justify the use of a Limited Tender.

This section describes two of these Special Circumstances.

### Applying the Special Circumstance - Urgency

The Special Circumstances recognise that there are times when Works or Construction Services are required immediately – for example to respond to:

* urgent events such as securing a building after a bushfire; or
* life-threatening situations.

Note that life-threatening situations include threats to human, animal and plant health.

These events are unforeseen and are generally beyond the control of the Agency.

Urgent events do not arise simply because a project is running behind or overtime.

Where an Agency commonly requires urgent Works or Construction Services, the Agency should consider arrangements to minimise the need to use a Limited Tender and to improve value for money outcomes including establishing:

* a standing order arrangement for managing urgent or minor Works or Construction Services; or
* a Supplier Panel that can be called on to respond in urgent circumstances.

The Supplier Panel should be established through a tender process that complies with the Directions. As part of their application to be on the Supplier Panel, potential members of a Supplier Panel should provide rates for the type of Works or Construction Services envisaged and their terms of engagement.

### Applying the Special Circumstance - For the performance of additional Works or the performance of additional Construction Services which are an extension of Works or Construction Services not included in an existing contract, but which are within the objectives of the original Tender Documentation

This Special Circumstance may apply when considering an extension of an existing contract.

For clarity, the Works or Construction Services should be consistent with the specifications and scope included in the original Tender Documentation.

This Special Circumstance addresses additional Works or Construction Services that were not known or disclosed when the Tender Documentation was released.

It is not necessary to apply this Special Circumstance to additional Works or Construction Services where the Tender Documentation discloses Works or Construction Services:

* to be undertaken in stages, including when decisions to undertake later stages may apply;
* to be undertaken as separable portions, including when decisions to undertake a separable portion may apply;
* subject to contractual options for additional Works or Construction Services; or
* subject to staged funding.

Other approvals may apply to confirm additional expenditure or variations to contracts.

# Promoting efficiency in the tender process

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

**Objective:** To help Agencies achieve efficiency in tendering and reducing the burden of the tender process

**Link to Direction:** Direction 3.3 Promoting efficiency in the tender process
**and Instructions** Instruction 3.3 Promoting efficiency in the tender process
 Direction 3.2 Competition and contestability
 Instruction 3.2 Competition and contestability

## Summary

The construction procurement principles recognise the role of competition and contestability in achieving value for money. This needs to be balanced against the cost of tendering and the need to conduct tender processes efficiently.

Striking this balance should reduce the burden of participating in tender processes for all tender participants. This might include using consistent processes and contractual terms and conditions.

This Guidance focuses on reducing the risk of the tender process becoming a burden to potential tender participants while meeting the need for competition. It addresses factors creating unnecessary burdens to either or both parties to a tender.

## Process planning and efficiency

Participating in a tender process involves time and cost for tender participants and the procuring Agency. This burden can be minimised if the Agency takes the time to prepare and plan the procurement properly, as required by Tender preparation and planning (Direction 3.1).

A disorganised tender process is likely to either discourage participation or result in risk premiums being applied to tender responses. Agencies should, when selecting tender participants, use processes that:

* are mindful of the impact on the market;
* are appropriate for the Procurement Model;
* are conducted in an efficient and timely way; and
* reduce unnecessary transaction costs for all tender participants.

Agencies can improve tender process efficiency by:

* developing and approving the scope of the tender before going to market;
* avoiding using bidders’ tender submissions as a pricing service for options;
* addressing the requirements that all tender participants will need to undertake – for example providing Bills of Quantities for Construct-only contracts;
* providing reports on ground conditions, contamination or native title that tender participants require to prepare their response;
* using consistent processes and contractual terms and conditions, where appropriate; and
* to the extent possible, obtaining statutory approvals before going to market and incorporating the requirements of that statutory approval into the Tender Documentation.

Although undertaking a particular study or process may add to the Agency’s preparation time, it will save tender participants’ time and put all participants on a level playing field.

The tender evaluation phase should be programmed into evaluators’ calendars to avoid lengthy delays between tender submission and contract award. This ‘waiting’ time is costly for tender participants, particularly if teams have to be retained and not move to other roles.

## Specific requirements to reduce the burden of tendering

Promoting efficiency in the tender process (Instruction 3.3) establishes three specific requirements to reduce the burden of tendering:

* not requesting unnecessary information:
* establishing cost estimates; and
* having a firm intention to proceed before beginning a tender process.

### Do not request unnecessary information (Instruction 3.3.1)

Requesting from tender participants only the information that is required for the relevant stage of the tender process is more efficient for tender participants and the Agency.

Agencies should consider the following ways to reduce the volume of information requested:

* Establish the information required to assess the evaluation criteria in a substantially complete evaluation plan.
* Do not request the same information at multiple stages of the tender process. Information sought at particular stages of the procurement should be relevant to the evaluation process at that stage.
* Do not request information if using a Register where the information has been provided in advance during prequalification. It is sufficient to confirm that there are no changes to the information and request submission by exception.
* In relation to information requirements:
	+ Project-specific documents should be, where possible, prepared only by shortlisted tender participants.
	+ Project plans such as a Safety Management Plan and Quality Plan, if not assessed in the evaluation criteria, should be required only from the preferred tender participant to include in the contract documentation.
* Material provided in the context of an earlier stage in a multi-stage tender process should not be required to be resubmitted in a later stage unless it is in an expanded form or the content of the material requires change.

Note that data held in a Register gives Agencies access to information ranging from basic business details to more comprehensive details including:

* the capability of the tender participant;
* the management/operating systems used by the tender participant including occupational health and safety management and industrial relations management;
* financial capacity;
* areas of expertise/skills/resources; and
* past performance.

From the tender participant’s side participating in a Register reduces the costs of preparing a detailed capability and capacity submission for each and every procurement opportunity.

### Establish cost estimates (Instruction 3.3.2)

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

A tender should not be released to market if it includes a requirement to price multiple options simply because the scope has not been sufficiently defined. Pricing multiple options imposes significant costs on the potential tender participants.

Example 1

An Agency intends to construct a new community health centre and has allocated funds for its construction. The budget is tight and the Agency is looking to reduce costs. A community meeting room is planned as part of the project, but funds for this component are subject to approval by another Agency.

The Tender Documentation describes that the health centre will comprise the health centre and the community meeting room which is subject to separate funding approval. The design allows for the community health centre to be constructed either with or without the community meeting room. The tender can be released to market in this form as the project scope has been finalised and the additional scope subject to additional funding approval has been disclosed.

Example 2

The Tender Documentation requires tender participants to price three types of external cladding material because the budget may not extend to cover the preferred cladding material. The tender should not be released to market in this form as the requirement to price multiple options is due to the project scope being incomplete. The Agency should finalise the project scope – determine which cladding material is to be used – before releasing the tender.

The restriction on pricing multiple options does not apply to:

* outcome-based specifications when market innovation in defining a solution is invited;
* where a project is subject to a high level of uncertainty and alternatives are included to future–proof the project (real option decision points – terminate, expand or descale) are relevant; or
* where partial funding is approved, but the funding of the full project is not yet secured, and the Tender Documentation clearly indicates the additional scope that may be included subject to additional funding approval.

In these situations, explain the situation in the Tender Documentation and include a strategy for addressing the flexibility required in the contract.

Before releasing a tender to market, Agencies may need to validate the expected total project cost so that it has confidence that the market can deliver the tender within the budget. This may be particularly relevant if a more advanced design becomes available, or if significant time has passed since the budget was developed and approved.

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

To avoid unnecessary effort on the part of both the tender participants and the Agency, in general a tender should not be released to market until the project funding is confirmed and there is a firm intention to proceed.

This includes avoiding publishing forward notices of upcoming procurement (see Forward notices (Direction 5.1)) in advance of funding approval or the government’s public commitments.

In circumstances where partial funding is approved, but the funding of the full project is not yet secured, the Tender Documentation should clearly indicate:

* the scope of work for which funding is approved; and
* the additional scope that may be included subject to additional funding approval.

## Useful resources

[Efficiencies in Major Project Procurement benchmarks for Efficient Procurement of Major Infrastructure, Volume 2 Benchmarks for Efficient Procurement of Major Infrastructure](https://www.infrastructureaustralia.gov.au/publications/efficiencies-major-project-procurement-volume-2-consultation-outcomes-report) (Infrastructure Australia, June 2012)

Describes efficiency strategies for very large infrastructure projects.

[Towards agreed expectations: Tender strategies to improve Design and Construct Infrastructure Delivery Outcomes](https://infrastructure.gov.au/infrastructure/publications/files/Towards_agreed_expectations.pdf) *(*Commonwealth of Australia Department of Infrastructure and Transport, June 2012)

Describes tender strategies to improve Design and Construct infrastructure delivery outcomes.

[National Framework for Traditional Contracting: The Guide Good Practice and Commercial Principles for Traditional Contracting](https://infrastructure.gov.au/infrastructure/ngpd/files/NFTC_The%20Guide.pdf) (Department of Infrastructure and Regional Development, September 2015)

Describes strategies to engage the market in the most effective and efficient way.

[Economic evaluation for business cases – Technical guidelines](https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-1-business-case) (Department of Treasury and Finance 2013)

Discusses use of real option analysis in the planning process.

[Investing under uncertainty Real options analysis technical supplement](https://www.dtf.vic.gov.au/investment-lifecycle-and-high-value-high-risk-guidelines/stage-1-business-case) (Department of Treasury and Finance, 2018)

Discusses how to deal with procurements involving uncertainty – using real options.

# Tender Notices

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

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

**Link to Direction:** Direction 3.4 Tender Notices
**and Instructions** Instruction 3.4 Tender Notices

## Summary

Publish a tender notice for each open or Selective Tender.

Tender Notices must be published on the website or system nominated by the Secretary.

A Tender Notice may also be published on the Agency’s website or an electronic tender system.

This Guidance sets out the content of a Tender Notice and describes where Tender Notices must be published.

## Tender Notices

Publish a Tender Notice for each open tender or Selective Tender.

The information that must be included in a Tender Notice is listed in Tender Notices (Instruction 3.4).

The Tender Notice should contain:

* a project summary;
* a listing of the Tender Documentation and how it can be obtained;
* key dates, such as briefing times, site visits and tender closing time;
* the Agency’s contact details;
* the number of copies and format required for submission (electronic or hard copy); and
* details of the tender submission location and timing.

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

Agencies should ensure that the Tender Documentation provides the information tender participants need to understand the:

* project requirements;
* terms and conditions applicable to the tender process; and
* terms on which the successful supplier will be engaged to perform the Works or Construction Services.

## Publish Tender Notices on the nominated website or system

For open tenders, the Tender Notices must be published on the website or system nominated by the Secretary to the Department of Treasury and Finance.

For Selective Tenders and Limited Tenders, 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 to the Department of Treasury and Finance where the expected value of the Selective Tender or Limited Tender is greater than:

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

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

In addition to the website or system nominated by the Secretary to the Department of Treasury and Finance, Agencies may publish the Tender Notice on their own website or through an electronic tender system.

Tender Notices should give potential tender participants participating in the tender process sufficient notice that it has begun. Sufficient notice means:

* for an open tender, notifying all local and international potential tender participants; and
* for a Selective Tender or a Limited Tender, notifying each tender participant invited to participate.

In addition to this notice requirement, consider other appropriate places to publish a Tender Notice. For example:

* regional newspapers for a regional project; or
* relevant specialist websites or publications when specialist Construction Services are required.

Agencies affected by the restrictions on print advertising should be aware of the requirements of this policy.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 |  2/8/2019 | Publish Tender Notices on the nominated system or website | 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.Remove reference to TendersVic site. | DTF |

# Tender open times

**Public Construction – Guidance 3.5
Effective date 1 July 2018**

**Objective:** To help Agencies determine an appropriate period for a tender to be open

**Link to Direction:** Direction 3.5 Tender open times
**and Instructions**

## Summary

Agencies should ensure the period between the Tender Notice and the tender closing date is reasonable taking account of:

* the tender strategy and Procurement Model;
* the likely tender participants and market characteristics;
* the complexity of the Works or Construction Services; and
* the time required to investigate, prepare, check and submit the response.

This Guidance describes the factors to consider when determining the tender open time.

## How to determine the tender open time

When determining the tender open time, consider the:

* complexity of the deliverable(s);
* extent and complexity of the tender requirements;
* level of completion of design specifications;
* extent to which the project scope, risks and commercial terms are unique;
* time required to obtain, read and analyse the Tender Documentation and seek and obtain responses to clarifying questions;
* information and level of detail tender participants are required to provide in a meaningful response that includes accurate pricing;
* level of risk and allocation of risk proposed or implied;
* likelihood and extent of subcontracting;
* likelihood of national or international tender participant interest; and
* likelihood of multiple tender participants with different skills having to prepare in joint bids.

The following table shows estimates of tender open and evaluation times. These estimates should only be used as a general guide. Times will of course vary depending on factors such as the project’s size and complexity.

|  |  |  |
| --- | --- | --- |
| Delivery Method | Tender open timeSimple to Complex(time in weeks) | Tender evaluation by AgencySimple to Complex(time in weeks |
| Construct-only | 2 to 4 | 1 to 2 |
| Design and Construct | 6 to 26 | 4 to 20 |
| Construction Management | 3 to 4 | 2 to 4 |
| Alliance | 2 to 4 | 2 to 4 |
| Public private partnership | 16 to 26 | 12 to 20 |

When an Agency and particular procurement is required to comply with International Agreements, a longer minimum open time will apply (see Complying with International Agreements (Instruction 2.1).

## Considerations for opening and closing dates

The timing of a Tender Notice can be important and may affect the extent of competition.

In determining the opening date try to:

* avoid periods when industry closes for key holidays; and
* avoid the week after a recognised industry holiday period.

In determining the closing date, try to:

* avoid setting a time before 2 p.m.;
* avoid Mondays or days following a public holiday;
* provide at least one clear day after a weekend, building industry holiday, or standard industry rostered day off; and
* provide a least one week after a recognised industry holiday period.

## Useful resources

[Efficiencies in Major Project Procurement benchmarks for Efficient Procurement of Major Infrastructure, Volume 1 Benchmarks for Efficient Procurement of Major Infrastructure](https://www.infrastructureaustralia.gov.au/publications/efficiencies-major-project-procurement-volume-1-benchmarks-efficient-procurement-major-infrastructure)(Infrastructure Australia, June 2012)

Describes tender open times for very large infrastructure projects

# Tender Documentation

**Public Construction – Guidance 3.6
Effective date 2 August 2019**

**Objective:** To help Agencies provide clear and fair information about the specific procurement opportunity

**Link to Direction:** Direction 3.6 Tender Documentation
**and Instructions** Instruction 3.6 Tender Documentation

## Summary

Tender Documentation released to the market should ensure tender participants clearly understand what the Agency is seeking to procure and promote fair and efficient competition.

Tender Documentation should provide tender participants with the information needed to submit a responsive tender.

Tender Documentation should be appropriate for the tender process, including staging (where applicable) and the Procurement Model.

As much as possible, Tender Documentation and processes should be familiar to the industry and promote consistency of process across comparable procurements.

Agencies should use standards known to the industry, including applicable Australian Standards and the Building Code Standards when drafting project specifications.

This Guidance describes factors to consider when preparing Tender Documentation.

**Note:** Relevant entities are not obligated to release confidential information, information that is sensitive to security, or information that may impede competition.

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

### Tender Documentation is appropriate for the tender process and Procurement Model

The Tender Documentation should:

* be scaled to the complexity of the procurement;
* be appropriate for the tender process, including staging where applicable, and the Procurement Model;
* be scaled to the level of design resolution consistent with the Procurement Model; and
* focus on eliciting the information necessary to determining the best value for money outcome.

Different Procurement Models address specifications in different ways. Specifications range from outcome-based requirements (frequently used in public private partnerships) to very detailed specifications used in a Construct-only project.

The extent of design resolution varies based on the Procurement Model. See [Government as Smart Client](http://www.ovga.vic.gov.au/news/74-procurement-government-as-smart-client.html) for a description of stages of the design process and extent of drawings recommended at each stage.

In a Construct-only project the specification and drawings may be supplemented by a Bill of Quantities – a measured list of the materials needed for the Works.

### Tender Documentation should promote open and fair competition

The Tender Documentation must include the mandatory items set out in Tender Documentation (Instruction 3.6) and, in addition, should:

* provide detailed specifications of all work to be covered by the contract and information for the potential tender participants to assess the project risks;
* identify any special conditions of contract stipulated by third parties (for example, as part of a statutory approval process);
* clearly specify any arrangement for novating agreements from the Agency and include the relevant novation agreements, subject to normal confidentiality requirements;
* be drafted clearly and concisely without unnecessary repetition (terms and phrases used throughout the documents should have consistent meanings) and avoid any poorly worded or ambiguous statements;
* detail the tender process including, for example, if the evaluation:
* reserves the option to use a best and final offer process; or
* assesses past performance or references from previous projects; and
* include copies of, or references to, any Agency procedures, standards or guidelines that Tender Documentation refers to or the tender participant is required to comply with.

Unless there is no other sufficiently precise way of describing a requirement, technical specifications should not require or refer to:

* a particular trademark or trade name;
* patent;
* copyright;
* design or type;
* specific origin;
* producer; or
* supplier.

Where relevant, words such as ‘or equivalent’ should be included with particular requirements.

However, where interoperability with existing equipment or systems is needed, it is appropriate to specify this even if that limits the field of potential tender participants.

### Terms and conditions applicable to the tender process

Evaluation criteria should:

* be presented clearly, including identifying any mandatory criteria;
* describe the relative importance of each criterion (this is only a mandatory requirement for procurements subject to international agreements, see Evaluation criteria (Guidance 3.7)); and
* be specific to the relevant stage of the approach to market.

Include all relevant administrative details related to submitting a tender, such as:

* the method and time to lodge tenders;
* access restrictions for lodgement; and
* the place or process for lodging tenders.

Include all relevant administrative details related to presenting a response, such as:

* the required format (electronic or hard copy); and
* the number of hard copies required to be submitted (noting a shift to electronic lodgement may reduce this burden on tender participants).

Provide contact details for the Agency, which may include:

* identifying the Agency’s contact person;
* providing an email address for enquiries; and
* listing separate contact details for arranging site visits or inspections.

Advise if a **best and final offer process** will be used. A best and final offer process is a formal request to all tender participants (or all shortlisted tender participants) to indicate if they are able to improve the offer they have previously submitted. Best and final offer processes are optional, but should only be used if the Conditions of Tender reserve the Agency’s right to ask for them. Treat tender participants subject to a best and final offer process in the same way.

Address whether **innovation is invited** as part of the tender response and how it will be handled.

Address how **late tenders** will be handled:

* In the event that the Agency is prepared to consider late tenders, the Conditions of Tender should describe how the Agency will treat late tenders. There may be a statement that late tenders will not be considered, but Agencies need to determine what is meant by a tender being ‘late’. The important consideration here is not the strict application of procedural rules but maintaining the integrity of the process and the principle of not allowing one tender participant to have an advantage over another.
* A tender participant should not be penalised if the reason a tender response is late is the fault of the Agency. The procedural rules set out in the Conditions of Tender should provide appropriate allowances for such situations.

Address whether the Agency reserves **the right to negotiate** with one or more tender participants.

Address how alternate or **non-conforming tenders** will be handled:

* Clearly state whether alternative tenders will be accepted, and the rules for submitting an alternative tender, for example, an alternative tender may be submitted subject to a conforming tender also being submitted.
* In the event that the Agency is prepared to consider non-conforming offers, then the Conditions of Tender should describe how the Agency will treat non-conforming offers. The important consideration here is not the strict application of procedural rules but maintaining the integrity of the process and the principle of not allowing one tender participant to have an advantage over another.

Address whether the [Victorian bid cost reimbursement policy for major construction projects](https://www.dtf.vic.gov.au/infrastructure-investment/bid-cost-reimbursement-major-construction-projects) applies, and what form it will take for the tender process.

## Avoid issuing late and multiple addenda

Agencies should ensure the Tender Documentation is sufficiently resolved before its release, to minimise the need for addenda or changes during the tender open period. A properly structured review of the Tender Documentation before release will support this. It is better to delay the release date than to issue Tender Documentation that has not been thoroughly checked and will need to be amended.

Sometimes it is necessary to make changes to the Tender Documentation during the tender open period. Good preparation and planning will help to minimise this.

Making changes to the Tender Documentation may affect tender participants’ ability to prepare a response. If this is the case, extend the closing date to allow tender participants time to respond to the changes.

All tender participants need to be given effective notice of addenda and any changes to the lodgement deadline.

Whether an adjustment to the closing time of the tender is needed depends on:

* the nature of the amendment and consequences for preparing responses (for example, a change to the design specification may require tender participants to obtain additional quotations or to undertake additional risk assessment); and
* the time remaining in the tender process (where a change occurs close to the closing date, tender participants will probably require more time to respond).

## What to include in Tender Documentation

Agencies must use the model Tender Documentation designed for use with a Victorian Public Construction Contract where appropriate. This model document has been developed to help standardise the documents submitted to the market, thereby reducing the burden placed on potential tenderers.

The following table describes the components of the Tender Documentation and the purpose they serve.

|  |  |
| --- | --- |
| Document | Description |
| Tender Notice | A notice that advises the market that the tender open time has begun. It contains a project summary, a listing of Tender Documentation and details about how to access the documents, key dates, contact details, tender submission requirements, location and timing. It is published on a common platform – being the website or system nominated by the Secretary to the Department of Treasury and Finance. |
| Conditions of Tender | The Conditions of Tender sets out the rules of the tender process and relationship to the model form. They detail the overall tender process including the delivery method, probity issues, communication issues and the evaluation criteria. |
| Tender Form and Schedules | The Tender Form and Schedules include a formal statement of the tender participant’s offer to supply the Works or Construction Services. These documents request specific information from tender participants and set out how the information should be provided. For example, it will include the overall cost, a breakdown of this cost, a program, details of manpower, plant and equipment, personnel, subcontractors and methodologies. This may include a Bill of Quantities (a measured list of quantities). |
| Conditions of Contract | This contains the commercial and legal terms on which the Works or Construction Services will be performed. Contracts must be developed in accordance with Contracting Requirements (Direction 7.1). In addition, Special Conditions that are unique to the Agency or project are sometimes included. |
| Specification | Depending on the type of delivery model chosen, this document may be a project brief or a detailed description of the Works or Construction Services. The specification sets out the performance and technical criteria. |
| Drawings | The number and standard of drawings provided is dependent on the chosen delivery method. |
| Additional information | Additional information concerning the project may include geotechnical investigations, Environmental Impact Study reports and working papers and other documents relevant to the project. |

The Tender Documentation needs to be supported by a forward notice (see Forward notices (Direction 5.1).

## Take care when preparing Tender Documentation

Be careful when developing and checking Tender Documentation because it can create a legally binding process contract or leave the Agency liable for misleading or deceptive conduct.

Ensuring Tender Documentation is accurate and reflects the way in which the Agency will conduct the tender is not just an efficiency or probity consideration, there are potentially legal and financial consequences for the Agency for not adhering to the terms set out in the Tender Documentation.

## Useful resources

The suite of Victorian Public Construction Contracts meets the contracting requirements in Contracting requirements (Direction 7.1).

Agencies are encouraged to refer to the Model Conditions of Tender when developing Agency-specific forms, to promote consistency across Agencies. The [Partnerships Victoria](http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships/Policy-guidelines-and-templates) Requirements provide model contract forms that apply when using this delivery model.

The Victorian Alliancing Policy provides model contract forms that apply when using this delivery model.

[Government as Smart Client](http://www.ovga.vic.gov.au/news/74-procurement-government-as-smart-client.html) (Office of the Victorian Government Architect, August 2013)

Describes stages of the design process and the extent of drawings recommended at each stage.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 |  2/8/2019 | Terms and conditions applicable to the tender process | Insert new item in the list of matters to consider in the ‘Terms and conditions applicable to the tender process’ to address whether the Victorian bid cost reimbursement policy for major construction projects applies, and what form it will take for the tender process. | DTF |

# Evaluation criteria

**Public Construction – Guidance 3.7
Effective date 1 July 2018**

**Objective:** To help Agencies in establishing criteria and undertaking the evaluation process

**Link to Direction:** Direction 3.7 Evaluation criteria
**and Instructions** Instruction 3.7 Evaluation criteria

## Summary

Evaluation criteria should reflect the objectives of the procurement.

Agencies may, but are not required to, include an indication of the relative importance or weighting of the evaluation criteria in the Tender Documentation.

Any mandatory evaluation criteria must be disclosed as such in the Tender Documentation.

Mandatory evaluation criteria related to value for money, occupational health and safety management, industrial relations management and appropriate consideration of a supplier’s past performance must be included in the Tender Documentation.

Value for money does not necessarily mean lowest price: it means best value procurement outcomes based on a balanced judgement of financial and non-financial factors relevant to the procurement, taking into account:

* the total benefits and costs over the life of the goods, services or works procured;
* environmental, social and economic factors; and
* any risk related to the procurement.

This Guidance describes the types of evaluation criteria and their disclosure in Tender Documentation.

## Types of evaluation criteria

The evaluation criteria should be well targeted, clearly measurable and not excessive in number.

Agencies may decide to indicate the relative importance of evaluation criteria - for example, by listing any ‘desirable’ criteria in order of relative importance - to help tender participants to develop their response.

Evaluation criteria come in different forms:

* mandatory criteria, which are pass or fail criteria but are not generally included in scoring submissions;
* criteria that are critical to the project objectives or context;
* criteria that support a level of confidence in a tender participant’s performance;
* criteria to distinguish value for money; and
* criteria to address broader government policies (for example the Local Jobs First - Victorian Industry Participation Policy).

Evaluation criteria should be linked to the project’s objectives to:

* help determine which response represents the best value for money; and
* help tender participants understand the drivers or constraints for the project, which may affect the way they develop their response.

Example

Projects on operational brownfield sites can require a careful strategy for staging.

### Recommended evaluation criteria for assessing Works

General criteria related to capability (or prequalification criteria):

* Financial capacity
* Organisational capacity
* Previous experience
* Resource availability
* Performance capability
* Environmental management
* Quality assurance systems
* Previous performance record
* Occupational health and safety management
* Industrial relations management

Project specific criteria:

* Project personnel and their competencies
* The method proposed for the project including program
* A project Health and Safety Management Plan
* Systems proposed for the project
* The capacity and current commitments of key personnel
* Insurances
* The response to government policies that apply to the project

### Recommended evaluation criteria for assessing Construction Services

General criteria related to capability (or prequalification criteria):

* Organisational capacity
* Technical and professional expertise and qualifications
* Quality assurance systems
* Previous experience
* Innovative ability
* Resource availability
* Environmental management
* Previous performance record
* Occupational health and safety management

Project specific criteria:

* Project personnel proposed and their competencies
* The method proposed for project
* Systems proposed for the project
* The capacity and current commitments (particularly for key personnel)
* The response to government policies applying to the project

## Mandatory evaluation criteria

Mandatory evaluation criteria must be set out in the Tender Documentation.

Mandatory evaluation criteria must be clearly identified as mandatory criteria.

Ensure that all suppliers engaged to perform Works or Construction Services satisfy the mandatory evaluation criteria set out in the Evaluation criteria (Instruction 3.7) where the thresholds listed in the Instruction have been met.

Where an evaluation criterion has been assessed as part of prequalification to a Register:

* avoid requesting the same information in a tender process because this duplicates the prequalification process;
* require the tender participant to confirm that they remain on the Register; and
* require tender participants to confirm that their circumstances or response to the criterion remains the same as when last submitted to the Register or earlier tender stage.

### Value for money

Value for money should focus on the costs and benefits of the response, as well as the risks associated with the proposal and the tender participant itself. Refer to the Victorian Government Purchasing Board’s [Achieving value for money – Goods and services procurement guide](https://buyingfor.vic.gov.au/achieving-value-money-goods-and-services-procurement-guide) for more information.

### Occupational health and safety management

The mandatory occupational health and safety management criteria are set out in Mandatory evaluation criteria for occupational health and safety management (Attachment 1 to Instruction 3.7).

Occupational health and safety management criteria must be used:

* for Works, where the value exceeds $500,000 (inclusive of GST); and
* for Construction Services, where the value of the services exceeds $200,000 (inclusive of GST).

See the Details guide for occupation health and safety management for more information about these criteria.

### Industrial relations management

The mandatory industrial relations management criteria are set out in Mandatory evaluation criteria for industrial relations management (Attachment 2 to Instruction 3.7).

Industrial relations management criteria must be used for Works where the value exceeds $500,000 (inclusive of GST).

See the Details guide for industrial relations management for more information about these criteria.

### Considering a tender participant’s past performance

Consideration of past performance may include:

* experience on similar projects and performance;
* references provided by the tender participant; or
* performance reports about the tender participant from previous work that are held by the Agency or the Victorian Government.

## Project specific evaluation criteria

Project-specific evaluation criteria:

* relate to the complexity or unique characteristics of the project;
* often address potential risks or uncertainties and quality of design: including accurately interpreting functional requirements;
* cover the ability to incorporate innovation, environmentally sustainable design or a level of flexibility;
* apply government social procurement policies;
* address specific site requirements;
* address how time frames will be met;
* demonstrate expertise in a construction method; or
* address how security requirements will be met.

Project-specific evaluation criteria may be mandatory - for example, if a tender participant is required to hold a particular licence. Project-specific mandatory evaluation criteria must be clearly described as being mandatory.

Under the [Value Creation and Capture Framework](https://www.vic.gov.au/value-creation-and-capture-framework) evaluation criteria may address how a tender proposal can maximise social, economic and environmental value from the infrastructure investment. For example, a proposal to build a railway station could include criteria for incorporating retail or residential facilities to reduce the cost to Government and maximise the value of the land.

## Probity considerations in tender evaluation

It is essential that tender evaluation criteria, weightings and processes are developed in the tender development phase. This ensures that the Tender Documentation is drafted in a way that will elicit all the information that the tender evaluation team requires and avoids having to request unnecessary information after the tender is released.

Well-defined Conditions of Tender and evaluation criteria give tender participants a clear indication of the project’s requirements. This aims to prevent unproductive use of resources and unsuitable or misdirected responses.

Decisions on the selection of suppliers should be made via an independent and objective evaluation against the nominated evaluation criteria and supply conditions.

Evaluation criteria:

* should not selectively advantage or disadvantage a particular tender participant or group of tender participants;
* should be based on objective measures that meet the primary procurement needs;
* avoid using technical specifications or criteria that discriminate against international or interstate tender participants; and
* should not discriminate on the basis of foreign ownership where an Agency is required to comply with International Agreements.

The tender evaluation team needs:

* appropriate technical and commercial capabilities to assess the responses;
* skills in communicating and negotiating;
* the ability to maintain critical objectivity during the tender process; and
* to be free of any conflict of interest that might undermine the objectivity of the evaluation.

## Useful resources

[Achieving value for money – Goods and services procurement guide](https://buyingfor.vic.gov.au/achieving-value-money-goods-and-services-procurement-guide) (Victorian Government Purchasing Board, 2018)

Describes applying and measuring value for money in procurement

Detailed guide on the mandatory occupation health and safety management criteria

Provides detailed information about the mandatory evaluation criteria for occupational health and safety management and guides how a supplier may demonstrate compliance with the criteria.

Detailed guide on the mandatory industrial relations management criteria

Provides detailed information about the mandatory evaluation criteria for industrial relations management and guides how a supplier may demonstrate compliance with the criteria.

# Probity – apply public sector values

**Public Construction – Guidance 4.1.1
Effective date 1 July 2018**

**Objective:** To define the principles of probity and to create an understanding of probity expectations, aligning them with Public Sector Values

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.1 Probity requirements

## Summary

Probity is a fundamental principle of Victorian Government procurement.

Probity stands for integrity, fairness and honesty.

Maintaining probity in procurement involves more than simply avoiding corrupt or dishonest conduct. It means ethical behaviour that upholds Public Sector Values and ensures impartiality, accountability and transparency.

The probity-specific Directions and Instructions should be an ongoing reference at all points of a tender process and contract management.

This Guidance discusses how the probity requirements for Public Construction Procurement encompass the application of Public Sector Values.

## Applying Public Sector Values

Probity is embedded in the overarching laws and codes that apply to the Victorian public sector, including in the:

* **Public Administration Act 2004 (Vic)**,
* [Victorian Public Sector codes of conduct](https://vpsc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/), and
* **Financial Management Act 1994 (Vic)**.

These laws and codes take precedence over the Directions and should be the starting point for determining the appropriate way to conduct Public Construction Procurement.

Agencies have policies, systems and procedures to address the [Victorian Public Sector codes of conduct](https://vpsc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/). Employees and contractors covered by the code are each individually responsible for adhering to them. Refer to Agency-specific policies about managing conflicts of interest and gifts, benefits and hospitality.

## Useful resources

[Victorian Public Sector codes of conduct](https://vpsc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/)

[Probity in procurement – Goods and services procurement guide](https://www.buyingfor.vic.gov.au/probity-procurement-goods-and-services-procurement-guide) (Victorian Government Purchasing Board, 2019)

Contains general guidance on probity issues for Agencies.

[National Public Private Partnerships Guidelines Volume 2: Practitioners’ Guide](https://infrastructure.gov.au/infrastructure/ngpd/files/Volume-2-Practitioners-Guide-Oct-2015-FA.pdf) (Department of Infrastructure and Regional Development, October 2015)

Contains guidance on probity issues that relate to public private partnerships.

[National Alliancing Contracting Guidelines](https://infrastructure.gov.au/infrastructure/ngpd/files/National_Guide_to_Alliance_Contracting.pdf) (Department of Infrastructure and Regional Development, September 2015)

Contains guidance on probity issues that relate to alliancing policy.

# Probity – treat tender participants fairly and equally

**Public Construction – Guidance 4.1.2
Effective date 1 July 2018**

**Objective:** To explain how the principles of probity relate to treating tender participants fairly and equally

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.1 Probity requirements

## Summary

The probity-specific Directions and Instructions should be an ongoing reference at all points of a tender process and contract management.

This Guidance discusses the probity requirements for fair and equal treatment of tender participants in Public Construction Procurement.

## Treating tender participants fairly and equally

Fairness and impartiality should be considered at all stages throughout a procurement process. Agencies need to be aware of how their actions will be perceived by tender participants and potential tender participants. For example to be fair and impartial:

* Do not engage in any conduct that would defeat the purpose of a fair and transparent selection process.
* Identify and actively manage actual and perceived conflicts of interest.
* Provide equal access to information made available at the same time for all interested tender participants (except for other tender participant’s details that are commercial in confidence).
* Provide additional information or clarification arising from individual potential tender participant’s equally to all potential tender participants and where feasible, do this in writing, whether in hard copy or electronic form.
* If the closing date is extended, provide an extension notice to all potential tender participants in sufficient time before the originally published closing date and time.

Tender participants invest time, effort and resources in preparing and submitting tender responses. In return, they are entitled to expect fair treatment at every stage of the procurement process. Any form of bias could jeopardise the integrity of a procurement. Tender participants have the right to lodge a complaint or to take legal action if they suspect bias, leading to delays and financial costs not anticipated in the budget.

## Dealing with current and previous suppliers

Tender participants may have an existing relationship with an Agency – for example, from a current or previous contract. During a procurement this may create a perception (whether real or perceived) among other tender participants that the current or previous supplier has an advantage. Agencies need to be aware of the potential for a current or previous supplier to gain a competitive advantage and to manage this situation.

Example

An Agency has a maintenance contract. The incumbent contractor has special knowledge of the services required and has developed a good relationship with the Agency. When re-tendering the services, other potential tender participants may feel that they cannot compete effectively and so may be discouraged from participating.

The challenge is to create a level playing field for all participants. Consider the following strategies:

* Separate duties so no-one involved in managing the current or previous supplier is involved in, or able to influence, the tender process.
* Adopt an effective disclosure and market engagement process. Include detailed (non-confidential) information about the requirement (including performance data such as volume or demand levels) in the Tender Documentation.
* Ensure the existing contract contains effective transition-out provisions. This will typically require the incumbent contractor disclosing information to both government and through government to other tender participants.
* Develop a strategy to assess value for money if the incumbent contractor is the only tender participant - for example, through benchmarking, preparing robust pre-tender estimates for comparison purposes and with open book reviews.
* Ensure that intellectual property rights under the current contract are sufficiently broad to allow the Agency to access and use the intellectual property.

## Industry engagement and collaboration

Done effectively, collaborating and engaging with the tender’s target industry before beginning the tender process can provide the following benefits:

* more potential for innovative solutions that are fit-for-purpose;
* greater confidence in the quality of the solution;
* fewer transition risks because tender participants have been involved with the Agency in developing solutions;
* more opportunities for the Agency to balance the service scope, quality and budget imperatives; and
* better focus for the shortlisted tender participants to refine and agree to the solution approach under competitive pressure.

Industry engagement and collaborative approaches can, however, lead to probity risks such as:

* Information provided might not be consistent with the Tender Documentation.
* Tender participants might not receive the same information, clarifications or guidance.

Strategies to deal with such probity risks include the following:

Ensure that details of any information provided, clarifications, questions submitted and answers given are recorded and distributed to all tender participants as soon as possible.

Make attendance at briefing sessions or site inspections mandatory, and confirm all participants’ attendance in writing. Written material may not address ‘nuances’ raised in conversation.

Avoid informal discussions between Agency representatives and tender participants before or after a briefing session.

Interactive sessions with tender participants are generally one-on-one meetings with each tender participant before the closing date for responses. Typically this form of collaboration involves the Agency interacting with the tender participants to test fit-for-purpose project ideas. This testing enables tender participants to be confident they are submitting a response that complies with tender requirements and that the Agency is likely to accept. Interactive sessions are useful where the procurement involves design (such as Design and Construct) or calls for innovation.

Interactive sessions should be carefully structured and preferably involve a probity adviser (either external or Agency based).

Generally, what is discussed in interactive sessions is not shared with other tender participants. However, if the Agency discloses any new information during a session, it should ensure that the same information is promptly shared with all tender participants. Any change to the Agency’s requirements following a session needs to be advised by an addendum to the Tender Documentation and issued promptly.

## Post-tender interviews

The Conditions of Tender should state if the evaluation team intends to interview all tender participants or only the short-listed tender participants. Agencies normally use this opportunity to ask questions to better understand the tender responses.

To ensure fairness in the post-tender interview process:

* All eligible tender participants should be given equal opportunity to participate in a post tender interview.
* All tender participants should be given equal time for their interview.
* No tender participant should be allowed to change or enhance the value of the response they have submitted.
* The interview should not be used to negotiate on price.
* Appropriate representatives from both sides should be at the interview and a written record of what is discussed should be kept, with a copy forwarded to the tender participant.

## Negotiations with preferred or short listed tender participants

The objective of any negotiation is to get the best outcome for the Agency. Negotiations may focus on any aspect of the response, such as the price, the terms and conditions of contract, the design or the completion timeframe.

In such negotiations the Agency should not make any substantial changes to the nature of its requirements or allow a preferred tender participant to improve its response in such a way that other tender participants might argue they could have matched, if given the same opportunity.

Where there are two responses of more or less equal merit it is acceptable to have a competitive negotiation. Only undertake a competitive negotiation if the Conditions of Tender allow for this. Treat the tender participants equally in any such negotiation.

The negotiation may take the form of a best and final offer process. A best and final offer is a formal request to all tender participants or all short-listed tender participants to indicate if they are able to improve their response. Best and final offer processes are optional and should only be requested if the Conditions of Tender reserve the Agency’s right to ask for them.

Treat the tender participants involved in the best and final offer process equally and follow the standard probity practices, such as equal access to information, equal time to prepare the response and documenting the process. Best and final offer processes are not an opportunity to change the tender requirements or to advantage or disadvantage any tender participant.

## Useful resources

[Probity in procurement – Goods and services procurement guide](https://www.buyingfor.vic.gov.au/probity-procurement-goods-and-services-procurement-guide) (Victorian Government Purchasing Board, 2019)

Contains general guidance on probity issues for Agencies.

[National Public Private Partnerships Guidelines Volume 2: Practitioners’ Guide](https://infrastructure.gov.au/infrastructure/ngpd/files/Volume-2-Practitioners-Guide-Oct-2015-FA.pdf) (Department of Infrastructure and Regional Development, October 2015)

Contains guidance on probity issues that relate to public private partnerships.

[National Alliancing Contracting Guidelines](https://infrastructure.gov.au/infrastructure/ngpd/files/National_Guide_to_Alliance_Contracting.pdf) (Department of Infrastructure and Regional Development, September 2015)

Contains guidance on probity issues that relate to alliancing policy.

[Towards agreed expectations: Tender strategies to improve Design and Construct Infrastructure Delivery Outcomes](https://infrastructure.gov.au/infrastructure/publications/files/Towards_agreed_expectations.pdf) *(*Commonwealth of Australia Department of Infrastructure and Transport, June 2012)

Describes collaborative strategies to improve Design and Construct infrastructure delivery outcomes.

# Probity – maintain confidentiality of tender participants’ confidential information

**Public Construction – Guidance 4.1.3
Effective date 1 July 2018**

**Objective:** To explain the importance of maintaining the confidentiality of tender participants’ information

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.1 Probity requirements

## Summary

The probity-specific Directions and Instructions should be an ongoing reference at all points of a tender process and contract management.

This Guidance discusses the probity requirements in relation to handling confidential information in Public Construction Procurement processes.

## How to maintain confidentiality of participants’ information

To uphold the integrity of competitive procurement, Agencies should maintain appropriate confidentiality to protect information and to give tender participants the confidence to do business with the Victorian Government.

Confidential information may include:

* designated or defined elements of the tender responses;
* proprietary methodologies held by the tender participants; or
* specific intellectual property and pricing and staffing structures.

Most of the information contained in tender responses should be kept confidential.

Confidentiality and security can be achieved in a number of ways, which should be scaled to match the size, complexity and risk of the procurement.

Follow defined document management and control procedures, including the physical security of submissions (and related documents) and confidentiality of commercial information and inform staff of these procedures.

Establish clear physical security measures for handling documents, such as:

* using a specific lockable tender room;
* maintaining a document register;
* providing secure storage and working areas;
* limiting the number of document copies;
* restricting access to controlled documents to authorised personnel; and
* ensuring strict movement controls on all offer-related documents.

Implement documented procedures for paper and electronic security including information storage and communication processes. This should include:

* controlling how documents are delivered electronically;
* protecting data stored on networks;
* segregating information held on networked devices;
* using independent security passwords; and
* transmitting documents securely, such as via password protected files and verifying procedures to ensure the correct transmission of emails and attachments.

Obtain specific advice from security experts or from a probity adviser if one has been appointed.

The need to maintain the confidentiality of participants’ information continues after the contract has been awarded. In particular, when contracts must be disclosed in full, commercially sensitive information should be redacted (see Publishing the details of procurements undertaken (Instruction 5.2).

Maintaining confidentiality is not absolute and should be assessed in terms of contract disclosure requirements for Freedom of Information and audit purposes.

## Useful resources

[Privacy by Design – Effective privacy management in the Victorian public sector](https://ovic.vic.gov.au/resource/privacy-by-design-effective-privacy-management-in-the-victorian-public-sector/?highlight=privacy%20by%20design) (Commissioner for Privacy and Data Protection)

This paper provides information and content about privacy by design and explains how and why privacy be design is helpful for the community and Agencies.

# Probity – auditable, accountable and transparent tender and contract management processes

**Public Construction – Guidance 4.1.4
Effective date 1 July 2018**

**Objective:** To outline auditable, accountable and transparent tender and contract management processes

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.1 Probity requirements

## Summary

Maintaining probity in procurement involves more than simply avoiding corrupt or dishonest conduct. It means ethical behaviour that upholds Public Sector Values and ensures impartiality, accountability and transparency.

The probity-specific Directions and Instructions should be an ongoing reference at all points of a tender process and contract management.

This Guidance discusses the probity requirements for accountability and transparency in Public Construction Procurement.

## Ensuring auditability, transparency and accountability

Accountability and transparency are fundamental to the work of Agencies and public officials.

Accountability means taking responsibility for the way particular duties have been performed. Accountability in procurement is being able to explain how the procurement has achieved its anticipated outcomes.

Transparency is about the openness of a procurement to scrutiny by interested parties, and relevant oversight bodies, such as the Victorian Auditor General’s Office. It involves providing documented reasons for decisions and giving appropriate information to relevant stakeholders and tender participants.

All records created or received in conducting a procurement activity, whether paper based or electronic, should be retained in an Agency's record keeping systems in line with the Agency's record keeping policies and procedures.

Processes and documentation should show that the Agency and individual procurement officers complied with legislation, regulations, Ministerial Directions, policies, codes, Agency procedures and plans specific to the procurement. Maintain records (Instruction 4.1.4) lists mandatory record-keeping matters.

The type and detail of information recorded will depend on the complexity or sensitivity of the particular procurement issue. However, where Agencies are making a decision that informs the conduct of the tender process - for example, how to handle a conflict of interest - ensure the decision is appropriately documented.

## Useful resources

[The red flags of corruption: procurement](http://www.ibac.vic.gov.au/docs/default-source/education-resources/red-flags-of-corruption-procurement.pdf?sfvrsn=10) (Independent Broad-based Anti-Corruption Commission (November 2015)

Describes strategies to mitigate risks in procurement

# Probity – identify and manage conflicts of interest

**Public Construction – Guidance 4.1.5a
Effective date 1 July 2018**

**Objective:** To outline transparent tender processes to manage conflicts of interest

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.1 Probity requirements

## Summary

The probity-specific Directions and Instructions should be an ongoing reference at all points of a tender process and contract management.

This Guidance discusses the probity requirements for managing conflicts of interest.

## Identifying and managing conflicts of interest

### Conflicts of interest affecting Agency staff

Conflicts of interest are not wrong in themselves. Any conflict of interest should be properly identified and declared, and effectively and transparently managed. Disclosing actual or potential conflicts is a continuous process, because conflict situations may change over time.

When a conflict of interest has been ignored, concealed, improperly acted on, or has influenced actions or decision making, either inadvertently or deliberately, that conduct(not the conflict itself) could be seen as misconduct, abuse of office or even corruption.

Follow the Agency’s procedures for identifying and managing conflicts of interest and refer to the [Victorian Public Sector codes of conduct](https://vpsc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/) for more information.

### Conflicts of interest between tender participants, advisers and the Agency

Conflicts of interest may arise between tender participants and advisers and between tender participants or advisers and the Agency. Find guidance on managing these situations in:

* the [Supplier Code of Conduct](https://buyingfor.vic.gov.au/supplier-code-conduct) which requires tender participants to declare and manage conflicts;
* Commitments from tender participants (Instruction 4.1.5);
* Tender Documentation which describes specific procedures that apply; and
* the contract conditions which describe procedures to follow during the contract period.

Example

The team developing the business case or project specifications may include external experts. Be aware if the organisations providing these experts are intending to tender or have existing relationships with potential tender participants which could create conflicts of interest.

The likelihood of expert advisers contributing to the project development and subsequently being involved in a tender response is a significant risk. Consider the whole project and be aware of the interrelated involvement between early advisers, evaluators and tender participants. Manage the potential conflict and maintain an even playing field for all potential tender participants.

Consider probity issues early in the process with up-front planning:

* Obtain probity advice at the concept development planning stage (pre-business case\_.
* Ensure all advisers or contractors are aware of the need to declare real or potential conflicts of interest.
* Establish and document a strategy for managing potential conflicts based on risk.
* Introduce exclusivity and confidentiality requirements in early work contracts.
* Document any conflicts arising and how they were managed.

### Potential conflicts when contracted staff are involved in a procurement

Potential conflicts of interest arise when contracted staff are engaged to work on a procurement. If any of these staff are an employee of a potential tender participant, ensure that commercially sensitive information of competing companies is not passed on, and that the contractors behave in a way that does not advantage any party.

Strategies to manage conflicts of interest include:

* confidentiality requirements connected to the contractor’s engagement;
* a requirement to divulge all potential conflicts of interest before and during the period of engagement; and
* restrictions on the use of material for a specified period.

Failure to meet these requirements at any time may be grounds for later ending the contract.

## Gifts, benefits and hospitality

Public officials involved in any aspect of a procurement process are strongly advised not to accept gifts, benefits or hospitality from tender participants, because they can, or may be seen to, compromise integrity and impartiality.

Potential tender participants should be made aware of the Agency’s policies about accepting gifts, benefits and hospitality.

For more information, refer to guidance published by the Victorian Public Service Commission and Agency-specific policies and procedures.

## Risks of probity breaches

Public sector employees have an obligation to act ethically and in the public interest at all times. There may be occasions where an officer becomes, through their actions or roles, the subject of accusations of:

* fraud – the false representation of facts with an intention to deceive or enable person or organisation to gain an unfair advantage (this includes falsifying documents and certifying statements known to be wrong);
* theft – stealing or dishonest misappropriation of money or property; and
* corruption – acceptance of any gift or consideration as an inducement or reward, misuse of information or misuse of position.

Robust procedures and processes that demonstrate strong probity principles will minimise the potential for officers to be exposed to such risks and allegations. In Victoria investigations of such allegations may be undertaken internally or by the Independent Broad-based Anti-corruption Commission, the Ombudsman, the Auditor General or the police.

## Dealing with probity breaches

Unfortunately, mistakes do happen and the response to a probity breach should be appropriate for the nature of that breach.

In a suspected probity breach, first raise the issue with the chair of the steering committee or the project manager as well as the probity adviser (if there is one).

Material breaches such as fraud and corruption with legal consequences should be dealt with according to the Agency’s procedures and referred to the Independent Broad-based Anti-corruption Commission or Victoria Police.

It is important to document that a breach was identified and that the actions taken were appropriate and reasonable under the circumstances.

Managing conflicts in the context of private sector advisers has been identified in a Victorian Auditor-General's Office performance audit tabled on 29 March 2018. One recommendation, was to require probity reports or sign-off letters for major procurement transactions, to disclose any material probity issues that arose during the relevant project, even where the issues were managed to the satisfaction of the probity practitioner and project governance group.

## Useful resources

[The red flags of corruption: procurement](http://www.ibac.vic.gov.au/docs/default-source/education-resources/red-flags-of-corruption-procurement.pdf?sfvrsn=10) (Independent Board-based Anti-Corruption Commission (November 2015)

Describe strategies to mitigate risks in procurement

[Conflicts of Interest in the Public Sector](https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Conflict-of-interest-in-the-public-sector) (Ombudsman Victoria, March 2008)

Reviews complaints of conflict of interest within the Ombudsman’s jurisdiction.

# Probity – commitment from tender participants

**Public Construction – Guidance 4.1.5b
Effective date 1 July 2018**

**Objective:** To outline the commitment that tender participants must make regarding conflicts of interest and prevention of collusion

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.1 Probity requirements

## Summary

The probity-specific Directions and Instructions should be an ongoing reference at all points of a tender process and contract management.

This Guidance discusses how the probity requirements apply to tender participants in relation to conflicts of interest and prevention of collusion.

## Commitments from tender participants to uphold standards

The Victorian Government is committed to ethical, sustainable and socially responsible procurement and expects the same high standards of its suppliers when providing Works or Construction Services to the Victorian Government.

Commitments from tender participants (Instruction 4.1.5) requires Agencies to obtain undertakings from tender participants that they will:

* immediately declare a potential or real conflict of interest;
* conduct themselves fairly and honestly;
* not engage in practices that would compromise a fair and transparent selection process; and
* not offer commissions or inducements to Agency personnel or other contractors and subcontractors to influence a tender process.

These commitments are required through:

* the [Supplier Code of Conduct](https://buyingfor.vic.gov.au/supplier-code-conduct) which outlines commitments required from all suppliers to the Victorian Government; and
* Commitments from tender participants (Instruction 4.1.5) which relates specifically to Public Construction Procurement.

Ensure that tender participants provide commitment letters in the model form as part of their tender response. The Model Request for Tender and returnable schedule, along with the suite of Victoria Public Construction Contracts provide a basis for ensuring that these commitments are received and addressed.

Collusive tendering or other anti-competitive practices have the ability to undermine the State's value for money objectives. A number of specific examples of activity that may constitute collusion or anti-competitive practices are set out in Instruction 4.1.5.

While some of these matters may also have legal consequences under competition laws, such as the **Competition and Consumer Act 2010 (Cth)**, including these commitments as a condition of participating in the tender process and as an ongoing contractual obligation ensures that the Agency can take action in relation to the behaviour.

Engaging with one or more potential participants in the context of forming a joint venture or consortium in the tender preparation process is not in itself collusive behaviour. Nor is the circumstance where, for example, there is limited expertise for a particular requirement and consequently a participant is party to multiple tender responses.

# Managing probity in Public Construction Procurement

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

**Objective:** To create an understanding of the need for probity systems, processes and plans and when to involve probity practitioners

**Link to Direction:** Direction 4.1 Probity requirements
**and Instructions** Instruction 4.2 Managing probity in Public Construction Procurement

## Summary

Procurements with a value in excess of $10 million (inclusive of GST), or that are otherwise complex or high risk, need to be managed in accordance with a probity plan.

Consider the use of probity advisers and probity auditors for complex, high value or sensitive procurements.

This Guidance outlines the requirements for probity planning and discusses when probity advisers and auditors should be considered.

## Probity planning and probity plans

The Agency undertaking the procurement must prepare a probity plan prior to commencing a tender process, if:

* the value of the Works or Construction Services is likely to be in excess of $10 million (inclusive of GST); or
* the Works or Construction Services are otherwise complex or high risk.

This is a longstanding policy underpinning Victorian Government procurement.

A probity plan supports consideration of probity issues prior to the start of a procurement. Probity planning should be applied to each aspect of the procurement process. Probity Plans should be customised to suit the procurement, taking into account the size, complexity and risks of the procurement.

For complex or otherwise high risk projects, a project-specific probity plan may be appropriate, whereas for more routine projects a standard Agency plan may suffice.

The probity plan should ensure the procurement strategy and plans provide the appropriate rigour and integrity to undertake the procurement consistent with [Public Sector Values](https://vpsc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/).

Probity requirements should not be viewed as an inhibitor to effective and efficient procurement, for example by limiting collaboration, but as an enabler to allow effective collaboration to readily take place, as may be appropriate for the Procurement Model used.

A probity plan provides guidance on the application of the probity requirements to the project. The specific objectives of the probity plan are to:

* fulfil the requirements of the Procurement;
* identify the probity risks that arise for the project and record the treatment actions required to address these risks;
* document processes that will support meeting high standards of probity;
* provide guidance on aspects of the procurement process, such as tender communications, record management;
* detail roles and responsibilities of persons involved in the project as they relate to probity; and
* describe the role of the probity adviser and auditor (when engaged) and encourage Agency staff to discuss any probity related issues with the probity adviser.

Probity considerations should form an integral part of any procurement process and not be a last minute concern. Among the key areas where probity should be incorporated into an Agency’s procurement systems, policies and procedures are the:

* procurement planning process;
* internal organisational and decision-making processes;
* security and confidentiality arrangements;
* communication with tender participants;
* offer evaluation and selection;
* contract formation;
* contract management;
* promoting a probity-oriented culture; and
* management of probity issues.

## Probity advisers and probity auditors

For most procurement activities, procurement staff and evaluation teams can effectively manage probity issues. Where the activity may be complex, high value, sensitive, or tender participant grievances are more likely, it may be beneficial to involve a probity adviser or a probity auditor (either in-house or external). The Victorian Government Purchasing Board’s [Probity in procurement – Goods and services procurement guide](https://buyingfor.vic.gov.au/probity-procurement-goods-and-services-procurement-guide) describes the roles of probity advisers and auditors.

Probity advisers and auditors should not be seen as a substitute for expert procurement officers managing a well-planned process. An Agency should routinely ensure it has personnel with the required skills and has the systems and processes in place to ensure good practice so that probity advisers and auditors are used as an exception rather than as a rule.

When the use of probity auditors or probity advisers is contemplated, this decision should be made at an early stage in the procurement process. The introduction of a probity adviser when a project has run into probity problems can be difficult – it is better for probity issues to be avoided or managed through the early involvement of a probity adviser.

As a general rule, Agencies that wish to obtain a level of independent verification, ensuring market confidence that the process followed is consistent with a particular standard or set of criteria should engage an audit-based service.

Agencies that mainly require practical assistance in identifying and managing a range of probity-related risks should engage an advice-based service.

Agencies engaging probity practitioners for major transactions should require that probity reports or final sign-off letters disclose any material probity issues that arose during the relevant project, even where the issues were managed to the satisfaction of the probity practitioner and project governance group.

## Useful resources

[Probity in procurement – Goods and services procurement guide](https://buyingfor.vic.gov.au/probity-procurement-goods-and-services-procurement-guide) (Victorian Government Purchasing Board, June 2019)

Describes the process to engage a probity adviser

Agencies that are [Victorian Government Purchasing Board in-scope entities](https://buyingfor.vic.gov.au/goods-and-services-mandated-agencies) or Agencies that use Victorian Government Purchasing Board standing offer contracts can access the [Professional Advisory Services Panel](https://buyingfor.vic.gov.au/professional-advisory-services-contract) for the engagement of probity practitioners.

# Forward notices

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

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

**Link to Direction:** Direction 5.1 Forward notice
**and Instructions** Instruction 5.1 Forward notice

## Summary

To promote open and fair competition and contestability, Agencies should ensure that all potential tender participants are given appropriate notice of upcoming procurements.

Publish a forward notice for all open and Selective Tenders.

The lead time for a forward notice needs to be appropriate for the type of procurement (longer for complex or high value projects and shorter for simple or low value projects).

Forward notices are published on the website or system nominated by the Secretary to the Department of Treasury and Finance using the applicable form.

A forward notice may be published on the Agency’s website or through an electronic tender system, in addition to the notice published on the website or system nominated by the Secretary to the Department of Treasury and Finance.

This Guidance describes the information to include in a forward notice and the suggested lead time for publishing.

## The role of forward notices

A forward notice is a notice that alerts potential tender participants to a future procurement.

A forward notice is separate to and published in advance of an expression of interest or Tender Notice. The forward notice does not replace either the expression of interest or Tender Notices; these notices will still need to be published at the appropriate stage of the procurement.

A forward notice only advises that a procurement opportunity is approaching. Other activities to generate tender participant interest, such as industry briefings, should also be undertaken, to the extent they are relevant to the procurement.

A forward notice enables tender participants to:

* understand the project requirements;
* gauge their interest in a procurement;
* understand the rules to participate in a procurement;
* confirm their eligibility to participate in a procurement, and if necessary, to gain the relevant certifications to allow them to participate; and
* develop relationships with other tender participants, so that bid teams are available to respond to a Tender Notice.

Providing potential tender participants with forward notice of an upcoming procurement is an important way to promote competition, contestability and efficiency. Publishing all forward notices on a central platform helps potential participants to find procurement opportunities they may be interested in and to plan their resources accordingly.

## Publishing forward notices on the nominated website or system

Forward notices must be published on the website or system nominated by the Secretary to the Department of Treasury and Finance using the applicable form.

In addition to the website or system nominated by the Secretary to the Department of Treasury and Finance, Agencies may publish a forward notice on their own website or through an electronic tender system.

A forward notice must be used for open tenders.

A forward notice must be used for Selective Tenders where the value of the engagement is expected to be 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.).

## Information to include in a forward notice

In addition to fields included in the applicable form, Agencies should communicate information that is relevant to the potential tender participants. Consider including:

* a brief description of the procurement including the extent of the Works or Construction Services required;
* the Procurement Model;
* the procurement process and indicative procurement program;
* expected prequalification levels or ‘minimum’ capability/capacity hurdles;
* government policies that affect the procurement; and
* details on how to access additional information.

Example of a description for the forward notice

[Agency name] is intending to release a Request for Tender in August 2018 for the design and construction of a community health centre located at [location] to provide expanded health services to the region. The project will include co-locating the minor surgical suites from [location]. The project will require the design and construction of the health centre, including fitout of the surgical suite.

For a simple procurement the mandatory fields in the applicable form may be sufficient to present the scope of information relevant to the procurement.

For more complex procurements, additional information may be presented, including by way of supplementary information made available either with the forward notice record, or published separately on a procurement-specific forum. Additional information may include advice on industry briefings, site visits and related procurements either underway or under consideration.

The forward notice should be updated as more information becomes available. For example, the Procurement Model may not be known when the forward notice was first published. Such information should be updated as it is developed.

## Lead time for forward notices

In determining the lead time for publishing a forward notice Forward notices (Instruction 5.1) requires Agencies to, as much as possible, take account of the following:

* the nature and complexity of the Works or Construction Services;
* the likely tender participants and market characteristics, including whether it will be necessary for tender participants to establish a consortium or likely interest from international tender participants; and
* the tender strategy and Procurement Model.

Where possible, it is better to apply longer periods to allow the market to prepare before the formal approach to market. In some instances Agencies may have an annual program of procurement activities, and it may be appropriate for their market sector to publish an annual program.

Suggested lead times for forward notices are described in the following table.

|  |  |  |
| --- | --- | --- |
| Complexity of procurement | Procurement Model | Suggested lead time (weeks) |
| Simpler | Construct onlyDesign and Construct - simple scopeConstruction management - simple scope | 4 - 8 |
| Moderate | Design and Construct - moderate to high complexityConstruction management - moderate to high complexityAlliance - simple to moderate complexity | 8 - 26 |
| High | Public private partnershipAlliance - high complexity | 26 - 52 |

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | Publishing forward notices on the nominated website or system | New paragraph 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 – Guidance 5.2
Effective date 30 December 2018**

**Objective:** To establish greater transparency for the market about government procurement outcomes

**Link to Direction:** Direction 5.2 Publishing the details of procurement undertaken
**and Instructions** Instruction 5.2 Publishing the details of procurement undertaken

## Summary

Agencies must publish the contract resulting from a procurement for Works or Construction Services with a value greater than $100,000 (inclusive of GST) on the website or system nominated by the Secretary to the Department of Treasury and Finance using the applicable form, along with key details of each contract.

Agencies subject to [Financial Reporting Directive 12B (Disclosure of major contracts)](https://www.dtf.vic.gov.au/financial-reporting-policy/financial-reporting-directions-and-guidance) must disclose the full text of contracts Works or Construction Services with a value greater than $10 million (inclusive of GST) on the website or system nominated by the Secretary to the Department of Treasury and Finance using the applicable form.

Agencies must also disclose variations to contracts on the record of disclosure.

This Guidance describes the scope of contracts subject to disclosure, the information to be disclosed and the circumstances when certain information may be withheld from publication.

## Contract disclosure requirements

Agencies subject to [Financial Reporting Directive 12B (Disclosure of major contracts)](https://www.dtf.vic.gov.au/financial-reporting-policy/financial-reporting-directions-and-guidance) must disclose:

* key details for contracts for Works or Construction Services with a total estimated value equal to or exceeding $100,000 (inclusive of GST); and
* full contract information for contracts for Works or Construction Services with an estimated value exceeding $10 million (inclusive of GST).

Other Agencies must disclose:

* the key details for contracts for Works or Construction Services with a total estimated value equal to or exceeding $100,000 (inclusive of GST).

## Required disclosure period

The contract information must be disclosed within 60 days of the award of a contract.

## Validating information before disclosure

Agencies need to ensure that contract information for public disclosure is:

* accurate;
* meaningful (provides sufficient information); and
* does not breach legislative or other requirements.

Do not disclose contract information if it contravenes legislative obligations. This includes, for example, obligations under the **Privacy and Data Protection Act 2014 (Vic)** and the **Freedom of Information Act 1982 (Vic)**.

The Agency should confirm thatit holds the rights to publish the intellectual property of any contractual document which is subject to disclosure before it is disclosed on the contracts website.

## Contracts that are subject to disclosure

Contracts and standing offer arrangements covered by the disclosure requirement are those for goods, Works and Construction Services. The types of contracts that are subject to disclosure are:

* contracts under seal (also known as deeds); and
* simple contracts (can be oral, written, or a combination of both).

Contractual documents that satisfy the above elements and are valued at $100,000 or greater (inclusive of GST) are considered to be contracts subject to disclosure. These include, for example, contracts concluded by an offer and letters of acceptance and formal (written) contracts.

Standing offer arrangements, whether or not constituted by contracts under seal (deeds), are subject to disclosure. Where contracts are made under standing offer arrangements, those contracts are also subject to disclosure and must be published.

Contracts subject to disclosure include:

* contracts for goods or materials;
* contracts for Construction Services;
* contracts for Works (including buildings, infrastructure and demolition);
* contracts that establish standing offer arrangements and Supplier Panel arrangements,
* contracts made under standing offer arrangements or Supplier Panel arrangements, such as:
	+ purchase orders issued under a standing offer arrangement; or
	+ purchase orders issued under State Purchase Contracts and Sole Entity Purchase Contracts where the services relate to Public Construction; and
* contracts entered into with suppliers listed on pre-qualification Registers.

It is not necessary to disclose contracts for Works or Construction Services that are awarded following a Limited Tender process that was conducted under the Special Circumstances set out in Instruction 3.2.2 'for protection of essential security interests’.

## Information to be disclosed - key details of contracts

Disclose the information required by the applicable form in the website or system nominated by the Secretary to the Department of Treasury and Finance.

## 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 in the website or system nominated by the Secretary to the Department of Treasury and Finance:

* where the estimated value of the contract exceeds $10 million (inclusive of GST);
* where [Financial Reporting Directive 12B (Disclosure of major contracts)](https://www.dtf.vic.gov.au/financial-reporting-policy/financial-reporting-directions-and-guidance) applies; and
* subject to grounds to withhold certain information from disclosure.

Disclosure of contracts and variation to contracts (Attachment 1 to Instruction 5.2) describes how to disclose 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.

Follow the requirements of Disclosure of contracts and variation to contracts (Attachment 1 to Instruction 5.2) when considering grounds to withhold certain information from disclosure.

## Disclosing contract variations

Variations that typically occur throughout the contract period involve:

* adding planned but not specified works or services;
* applying contingencies for Agency variations to the scope of works or services;
* addressing errors and omissions in the design or documentation, or
* addressing staged or periodic extensions to contracts.

Variations may affect the contract value, scope, duration or other elements of the contract, or a combination of these.

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.

Follow the requirements of Disclosure of contracts and variation to contracts (Attachment 1 to Instruction 5.2) when disclosing variations or amendments to contracts for Works or Construction Services.

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| **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 |

# Use of Registers and Supplier Panels

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

**Objective:** To help Agencies to establish effective and efficient relationships with the market

**Link to Direction:** Direction 6.1 Use of Registers and Supplier Panels
**and Instructions** Instruction 6.1 Use of Registers and Supplier Panels

## Summary

Agencies must ensure that any Register of prequalified suppliers or Supplier Panel is established and operated in accordance with the Instructions.

This Guidance describes the types of Register available for Public Construction Procurement, considerations when selecting suppliers from a Register and how to use Supplier Panels.

## Registers

### Whole of government Registers

A whole of government register must be established and operate in accordance with Use of Registers and Supplier Panels (Instruction 6.1). Accreditation of each whole of government register is subject to the approval of the Secretary to the Department of Treasury and Finance.

The terms and conditions associated with a whole of government Register are the responsibility of the Agency responsible for that Register. The Agency responsible for a whole of government register must provide support services for the Register including carrying out assessments on financial, operational, mandatory and other criteria and registering the details for Agencies that are seeking tenders and quotations in accordance with the Directions.

See [Government prequalification Registers for construction](https://www.buyingfor.vic.gov.au/government-pre-qualification-registers) for a list of whole of government Registers.

### Agency specific Registers

An agency specific Register must be established and must operate in accordance with Use of Registers and Supplier Panels (Instruction 6.1). Accreditation of each agency specific register is subject to the approval of the Secretary to the Department of Treasury and Finance.

An agency specific Register is generally created to support the activities of an Agency and may be made available to other Agencies under the following conditions:

* access to the register is subject to the consent of the Agency which established it; and
* responsibility for ensuring that the agency specific register criteria are appropriate to specific project needs lies with the Agency seeking to use the register.

See [Government prequalification Registers for construction](https://www.buyingfor.vic.gov.au/government-pre-qualification-registers) for a list of 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.

## Selecting prequalified candidates from Registers

When using a Register to select potential tender participants consider:

* the prequalification category suited to the scale and complexity of the procurement;
* the type of work involved;
* tender participant interest in different types of project;
* tender participant interest in operating in different locations; and
* supplier performance.

When undertaking a Selective Tender through a Register the selection process may be undertaken by:

* selecting a number of suitable tender participants to be invited to submit responses;
* inviting all participants listed for the appropriate category; or
* inviting expressions of interest from prequalified participants to undertake the Works or Construction Services and through the assessment of the expression of interest determine the tender participants to be invited to submit responses.

The method used to select tender participants from a Register is driven by the nature of the project, timing or current market demand and the need to confirm availability of tender participants.

Potential tender participants listed on a Register do not enter into a contract with the Agency managing the Register. Following selection to provide the Works or Construction Services, the procuring Agency needs to confirm the engagement by entering into a procurement specific contract with the supplier for those Works or Construction Services.

## Establishing a Supplier panel

Where existing arrangements to select potential tender participants, including any Registers, do not meet the business needs of an Agency, consideration could be given to establishing a Supplier Panel.

A Supplier Panel may be established for a program of similar activities, or for a period of time. Supplier Panels may be established on an Agency specific basis, or may be established by a group of Agencies with similar procurement requirements.

Supplier Panels are typically established to enable rapid selection and engagement of suppliers. Members of a Supplier Panel 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.

Example

An Agency has a series of projects with similar characteristics. In order to streamline the process to select and engage suppliers, it decides to establish a Supplier Panel to support the program of works.

The Agency publishes a forward notice to advise the market of its intention to undertake this series of projects over the next three years. Further details in the forward notice include the approximate scope of work projects and the intention to create a Supplier Panel to efficiently allocate work packages.

Subsequently the Agency issues an open request for tender inviting potential participants to indicate their interest in the Supplier Panel and to submit offers to undertake the works. As the Supplier Panel is to undertake various work packages over three years, the agreement is set up for three years with an option to extend for one year and this is noted in the Tender Documentation.

Twelve tender participants submit responses. Following assessment against the evaluation criteria, the Agency selects four suppliers that provided best value for money responses. Agreements are entered into with these four suppliers. These agreements detail the terms of engagement and nominated rates for each supplier.

At the conclusion of each work package, an assessment of the supplier’s performance is undertaken.

Supplier Panels must be established and approved using a procurement method that complies with the requirements of the Panels of suppliers (Instruction 6.1.4). The Agency establishing a Supplier Panel is responsible for its terms and conditions of use. The Agency must also establish appropriate processes to monitor and record performance of members of a Supplier Panel under the Supplier Panel agreement, consistent with Instruction 6.1.4.

Differences between Supplier Panels and Registers are described in the following table:

|  |  |  |
| --- | --- | --- |
|  | Register | Supplier Panel |
| Operating period | Open ended | Fixed period of time |
| Contract arrangement – when established | Not required for listing on RegisterContract entered into following selection to undertake the Works or Construction Services | Required for membership on the Supplier Panel |
| Rates and personnel to perform the Works or Construction Services | Submitted in response to an invitation to participate | Submitted as part of the procurement process – determined before any specific project |

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | Agency specific registers | Insert new paragraph clarifying 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 |

# Contracting requirements

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

**Objective:** To establish greater consistency in contracting arrangements

**Link to Direction:** Direction 7.1 Contracting requirements
**and Instructions** Instruction 7.1 Contracting requirements

## Summary

Agencies must use an approved contract. Approved contracts are presented as ‘Victorian Public Construction Contracts’. These contracts are supported by a clause bank.

There are limited circumstances where use of an alternative contract is permitted.

Even where an Agency is permitted to use an alternative contract, the requirements of Contractual terms and conditions (Direction 7.2) must be complied with.

Procurements that are subject to (and fully comply with) the Partnerships Victoria Requirements or the Victorian Alliancing Policy are not subject to these requirements.

Material departures or amendments to contracts require approval by the Secretary of the Department of Treasury and Finance.

This Guidance sets out the forms of contract to be used when undertaking Public Construction Procurement.

## Benefits of using standard contracts

Using standard form contracts in the construction industry is an important way to reduce the burden of tendering.

Industry (and contract managers) prefer standard forms of contract because they are more likely to be familiar with the obligations that apply to both parties. This approach is more efficient reducing the need for unnecessary legal reviews. It is also likely to reduce the number of disputes caused by unfamiliar aspects of the contract.

Introducing unique terms and conditions add to the cost of tendering by requiring tender participants, and the State where accepting departures, to obtain separate commercial and legal advice to understand the implications of any amendments.

## Use of approved contracts at tender

When an Agency issues a tender, the proposed contract included in the tender documentation must be a Victorian Public Construction Contract, except where the value of the Works or Construction Services is valued up to $15,000 (inclusive of GST). A Victorian Public Construction Contract issued at tender may be amended as needed to comply with legal or policy requirements.

An Agency is permitted to issue a tender that includes an alternative form of contract (for example, an Agency’s purchase order or works order) for Works or Construction Services valued up to $15,000 (inclusive of GST).

Permission to either use a different contract, or to amend a Victorian Public Construction Contract (beyond what is needed to comply with law or policy), is available where:

* an Agency’s Accountable Officer (or delegate) is satisfied that an unamended Victorian Public Construction Contract is inappropriate for the type of Works or Construction Services being procured;
* an Agency’s Accountable Officer (or delegate) is satisfied that an unamended Victorian Public Construction Contract does 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.

Contracts approved under the High Value High Risk Framework are permitted under the Directions or Instructions.

## Transitional use of Agency precedent contracts

Agencies are permitted to use existing precedent contracts during the transition period, pending review by the Department. To be able to rely on this transitional provision, Agencies must follow the process set out in the Fact sheet - Transition provisions for the introduction of the revised Ministerial Directions for Public Construction.

The Secretary to the Department of Treasury and Finance will remove this transitional provision from the Instructions once the Department of Treasury and Finance’s review of existing Agency precedents is complete.

For the avoidance of doubt, removing permission to use a form of contract under the transition provision has no effect on contracts that have been entered into.

## Your lawyers and amendments to contracts

When engaging lawyers to draft amendments to Victorian Public Construction Contracts Agencies should require them to help meet the obligations under the Ministerial Directions and Instructions. Agencies can achieve this by including the following model clause in instructions to the lawyer, contract or purchase order.

This clause has been developed for use with a Legal Services Order under the Victorian Government's Legal Services Panel. Minor changes to the clause may be needed when using the clause under different contracts or arrangements.

‘Service Providers must adhere to the protocols and requirements outlined in **Project Development and Construction Management Act 1994**Ministerial Directions for Public Construction Procurement. In particular, the Ministerial Directions for Public Construction Procurement list the forms of contract approved for use by the Victorian Government departments and public bodies, and the considerations and approvals that apply when seeking to use an alternative or amended form of contract. Service Providers must ensure that contract modifications, amendments and special conditions of contract must:

* be kept to a minimum;
* not be onerous; and
* only be used where there is a clearly established justification.

The Ministerial Directions for Public Construction Procurement are available at <https://www.dtf.vic.gov.au/public-construction-policy-and-resources/construction-procurement-and-delivery-requirements>.‘

## Tendering with alternative contracts

Where the use of either an alternative or amended contract is permitted, the contract used must be:

* appropriate for the Procurement Model;
* consistent with other contracts used by the Agency; and
* compliant with law and policy.

Where the use of amended Victorian Public Construction Contract is permitted, Agencies must:

* avoid unnecessary amendments; and
* clearly identify amendments.

To identify amendments to Victorian Public Construction Contracts:

* introduce separate special conditions, where amendments to the form are clearly identified; or
* use a ‘track changes’ function.

## Accepting departures and amendments

Agencies have the discretion to agree to non-material contract departures during tender negotiations or to non-material contract amendments after a contract is signed.

Material contract departures or amendments may only be agreed to following approval of the Secretary to the Department of Treasury and Finance (or the Secretary’s delegate).

Material contract departures or amendments are those 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***.* Agencies are encouraged to contact the Construction Policy Unit within the Department of Treasury and Finance for further guidance as to whether a contract departure or amendment is material.

When agreeing to non-material contract departures or amendments, or seeking approval to agree to material contract departures or amendments, Agencies should ensure that agreeing to the departure or amendment is:

* compliant with legal, policy and probity requirements (in particular, that the Agency is complying with the tender process that it set down);
* appropriate for the Procurement Model;
* appropriate for the type of Works or Construction Services being procured;
* appropriate given the size, nature, functions and procurement capability of the Agency; and
* appropriate given the risk, value and complexity of the procurement.

## Victorian Public Construction Contracts

The suite of Victorian Public Construction Contracts includes the most commonly used standard form construction contracts:

* AS 2124-1992 (Construct Only) and AS 4300-1995 (Design and Construct) as amended by the Victorian Public Sector Special Conditions; and
* model contracts for minor works; and
* consultancies (Construction Services).

These commonly used contracts have been updated and amended to support the Directions. They are supported by contracting practice notes, and provide standard approaches to commonly varied alternate commercial positions that can be included where appropriate and relevant.

In addition to these commonly used contracts, the suite of Victorian Public Construction Contracts includes other contracts developed by industry bodies and Victorian Government Agencies. Over time, the Department of Treasury and Finance will consider which other contracts should be added to the suite (including precedent contracts submitted under the transitional arrangements) and which existing contracts should be retired from use.

For the avoidance of doubt, retiring a Victorian Public Construction Contract has no effect on contracts that have been entered into.

When using a Victorian Public Construction Contract Agencies need to check the contracts remain up to date with policy and legislative requirements.

## High Value High Risk Projects

Contracts for High Value High Risk projects are more likely to require specific terms and conditions. However, Agencies are expected to use Victorian Public Construction Contracts for High Value High Risk projects where possible, with amendments limited to necessary changes.

These contracts will be assessed as part of the High Value High Risk framework, but are still required to comply with the legislation and Victorian Government policy requirements listed in Contractual terms and conditions (Instruction 7.2).

## Useful resources

Suite of Victorian Public Construction Contracts.

The Partnerships Victoria Requirements provide [model contract forms](http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships/Policy-guidelines-and-templates) that apply when using this delivery model.

The Victorian Alliancing Policy provides model contract forms that apply when using this delivery model.

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| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | Use of approved contracts at tender | Clarify use of approved contracts at tender for low value tenders. An Agency is permitted to issue a tender that includes an alternative form of contract (for example, an Agency’s purchase order or works order) for Works or Construction Services valued up to $15,000 (inclusive of GST). | DTF |
| 1 | 30/12/2018 | Use of approved contracts at tender | Paragraph beginning ‘Permission to either use a different contract, or to amend a Victorian Public Construction Contract’, clarify that the first bullet point refers to both Works or Construction Services being procured. | DTF |
| 1 | 30/12/2018 | Use of approved contracts at tender | Paragraph beginning ‘Permission to either use a different contract, or to amend a Victorian Public Construction Contract’, clarify that the second bullet point refers to the use of the defined term Works. | DTF |
| 1 | 30/12/2018 | Transitional use of Agency precedent contracts | New paragraph inserted clarifying that removing permission to use a form of contract under the transition provision has no effect on contracts that have been entered into. | DTF |
| 1 | 30/12/2018 | Your lawyers and amendments to contracts | New paragraph inserted to support Agencies when engaging lawyers to draft amendments to Victorian Public Construction Contracts. Agencies should require the lawyers to help meet the obligations under the Ministerial Directions and Instructions. Agencies can achieve this by including a model clause in instructions to the lawyer, contract or purchase order. | DTF |
| 1 | 30/12/2018 | Victorian Public Construction Contracts | New paragraph inserted clarifying that retiring a Victorian Public Construction Contract has no effect on contracts that have been entered into. | DTF |

# Compliance with legislative and policy requirements

**Public Construction – Guidance 7.2.1
Effective date 30 December 2018**

**Objective:** To list policy requirements that construction contracts must comply with

**Link to Direction:** Direction 7.2.1 Contractual terms and conditions
**and Instructions** Instruction 7.2.1 Contractual terms and conditions

## Summary

Contracts for Public Construction Procurement need to address legal and policy requirements.

Policy requirements include those that apply generally, those specific to procurement, and others specific to construction procurement.

This Guidance summarises the legal and policy requirements that are most relevant to contracts for Public Construction Procurement.

## Purpose

Many legislative and policy requirements impact the way that government interacts with its external suppliers, including the rights and obligations owed.

These requirements seek to achieve many aims, some of which include:

* effective public financial management (for example, auditing requirements);
* fair treatment of suppliers (for example, fair payment and intellectual property requirements);
* transparency and accountability (for example, freedom of information and contracts publishing); and
* broader social, economic or environmental outcomes (for example, industry participation and social procurement).

In many instances, compliance with policies and legislation requires Agencies to include certain rights and obligations in their contracts with external suppliers.

## Summary of legislative requirements

This is not an exhaustive summary of policy and legislative requirements that may be relevant to contracts for Works or Construction Services. Agencies must ensure that they comply with any other policy or legislative requirements that are not summarised here.

Not all laws or policies apply to all procurements. Verify the operation of policy or legal requirements before addressing them in contracts.

Nothing in this Guidance is intended to extend, limit or alter the scope of these legislative and policy requirements.

### Victorian Auditor General’s ‘follow the dollar’ powers

Under the **Audit Act 1994 (Vic)**, the Victorian Auditor-General’s Office has powers to determine the efficiency, effectiveness and economy of the services and functions delivered through contracts with private or not-for-profit providers and associated entities through 'follow-the-dollar' performance audits.

The Victorian Auditor-General’s Office’s powers to conduct follow-the-dollar audits exist under legislation. Instruction 4.2.1(3.1(g)) of the Financial Management Act Standing Directions 2018 Instructions requires contracts to provide for the Auditor-General to have access to the premises and systems of private sector contractors and subcontractors as necessary under statute.

Contracts for Works or Construction Services should reflect Victorian Auditor-General‘s statutory powers to conduct 'follow the dollar' audits under the Audit Act to achieve the following outcomes:

* clarify that any audit undertaken by Victorian Auditor-General under the Audit Act does not give rise to any entitlement to time or cost under the contract, or to other claims against the Agency;
* require the Contractor to permit, and procure that its subcontractors and suppliers permit a public audit and comply with the Victorian Auditor-General ‘s requirements during the audit;
* require the Contractor to provide the Victorian Auditor-General with reasonable working accommodation and associated facilities where required for the purpose of undertaking the audit; and
* clarify that the Contractor's obligations of confidentiality under the contract are subject to the Contractor's obligations under the Audit Act.

### Security of payment

Security of payment (Direction 7.2.7) requires contracts to be consistent with the requirements of the **Building and Construction Industry Security of Payment Act 2002**.

The Act is designed to ensure that people and businesses who undertake to carry out construction work or supply related goods and services under a construction contract are:

* entitled to receive progress payments, by granting them a statutory entitlement to that payment; and
* able to recover progress payments, by establishing procedures for the making of payment claims, adjudication of disputed payment claims, and recovery if payment is not made.

### Privacy and data protection

Agencies covered by the Directions must handle official and personal information in accordance with the **Privacy and Data Protection Act 2014 (Vic)** and associated Information Privacy Principles and Codes of Practice.

At a minimum, Agencies must ensure that contracts for Works or Construction Services contain provisions addressing the Privacy and Data Protection Act that:

* require the Contractor to be bound by the requirements of the Privacy and Data Protection Act, particularly the Information Privacy Principles and applicable Codes of Practice as if it were the Principal;
* require the Contractor to notify the Principal when it becomes aware of a breach of the requirements of the Information Privacy Principles and applicable Codes of Practice;
* ensure these obligations survive termination or expiration of the contract; and
* ensure that these requirements are passed on to subcontractors where necessary.

Additional contractual obligations and management systems may be required if the nature of the Works or Construction Services mean that the Contractor will have access to sensitive information.

### Freedom of Information

Tender Documentation and contracts must make it clear that the Agency may disclose documents submitted by tender participants to comply with the **Freedom of Information Act 1982 (Vic)**, subject to the exemptions in that Act.

## Summary of policy requirements

This is not an exhaustive summary of policy and legislative requirements that may be relevant to contracts for Works or Construction Services. Agencies must ensure that they comply with any other policy or legislative requirements that are not summarised here.

Not all laws or policies apply to all procurements. Verify the operation of policy or legal requirements before addressing them in contracts.

Nothing in this Guidance is intended to extend, limit or alter the scope of these legislative and policy requirements.

### Partnerships Victoria Requirements

When undertaking a public private partnership, Agencies must comply with the Partnerships Victoria Requirements. This policy comprises the Partnerships Victoria Requirements and associated guidance and templates, along with the National Public Private Partnerships Policy and Guidelines.

The Partnerships Victoria Requirements include standard form contracts and agreed commercial positions. The requirements of the Partnerships Victoria Requirements take priority over any of the matters set out in the Directions and Instructions to the extent there is any conflict.

Refer to the [Partnerships Victoria Requirements](https://www.dtf.vic.gov.au/public-private-partnerships/policy-guidelines-and-templates) for more information.

### Victorian Alliancing Policy

When undertaking an alliance or other collaborative form of contracting, such as early contractor involvement or managing contractor arrangements, Agencies must comply with the Victorian Alliancing Policy.

The requirements of the Victorian Alliancing Policy take priority over any of the matters set out in the Directions and Instructions to the extent there is any conflict.

Refer to the Victorian Alliancing Policy for more information.

### Fair Payments Policy

The [Victorian Government’s Fair Payments Policy](https://www.vsbc.vic.gov.au/how-we-help/monitoring/monitoring-sub-page-state-government-fair-payments-policy/) exists to support small and medium businesses by increasing the timeliness and certainty of cash flow. The Fair Payments Policy applies to contracts entered into for goods and services, including Works or Construction Services, where the total value does not exceed $3 million.

If the Fair Payments Policy applies to a procurement, Agencies must include contractual provisions that provide for:

* payment of properly rendered tax invoices within 30 days;
* penalty interest to be accrued at the rate set out under the**Penalty Interest Act 1983 (Vic)**;
* the Contractor to provide notice on late payment in order to receive penalty interest; and
* suspension of the 30 day payment requirement in the event of a disputed amount.

Most contracts for Works or Construction Services are also subject to the **Building and Construction Industry Security of Payment Act 2002 (Vic)**. Security of payment (Direction 7.2.7) requires that contracts for Works or Construction Services be consistent with this Act and provide for:

* fair entitlement to payment, including identifying appropriate milestone payments; and
* prompt payment, with interest payable on late payments.

### Protective Data Security Standards

The Victorian Data Security Standards, issued under the Privacy and Data Security Act, establish 18 high level mandatory requirements that Agencies must comply with to protect public sector data.

Agencies must ensure that contracts contain provisions that prohibit the Contractor from breaching or causing the Agency to breach a Protective Data Security Standard in respect of any data held, used, managed, disclosed or transferred by the Contractor on behalf of the Agency.

Refer to the [guidance issued by the Office of the Victorian Information Commissioner](https://www.cpdp.vic.gov.au/menu-resources/resources-privacy/resources-privacy-guidelines).

Where health information may be accessed by the Contractor when performing Works or Construction Services, Agencies should ensure appropriate provisions are included in contracts to address the requirements of the **Health Records Act 2001 (Vic)**.

### Intellectual Property Policy

The [Whole of Victorian Government Intellectual Property Policy](https://www.dtf.vic.gov.au/funds-programs-and-policies/intellectual-property-policy) applies to all Departments and Agencies. It is supported by the Intellectual Property Guidelines. The intention of the Intellectual Property Policy is that:

* the State grants rights to its intellectual property, as a public asset, in a manner that maximises the impact, value, accessibility and benefit consistent with the public interest; and
* the State acquires or uses third-party intellectual property in a transparent and efficient way, upholding the law and managing risk appropriately.

Intellectual property may arise in a procurement for Works or Construction Services in a number of ways:

* intellectual property inputs: intellectual property brought to the agreement by the agency or contractor, including:
	+ background intellectual property: existing intellectual property owned by the agency or the contractor and brought to the agreement as a tool or building block, such as pre-existing business processes;
	+ third party intellectual property: intellectual property brought to the agreement by one of the parties to the contract but owned by a third party, such as software programs;
* intellectual property outputs: intellectual property generated as a result of the agreement, usually referred to as project, contract or developed intellectual property. There may also be improvements made to intellectual property inputs which are created incidentally to the procurement activity. These should also be considered as part of the project intellectual property.

Under Principle 9 of the Intellectual Property Policy, when procuring Works or Construction Services Agencies must:

* address in an agreement any rights to intellectual property (including pre-existing intellectual property) that may arise as a consequence of the procurement;
* secure a licence to the intellectual property, only to the extent necessary to achieve the purposes of the procurement; and
* only acquire ownership of the intellectual property if a licence is not adequate in the circumstances.

The Intellectual Property Guidelines require contracts to address background intellectual property, third party intellectual property and project intellectual property in a manner appropriate to the purpose of the procurement and consistent with the Intellectual Property Policy. Appropriate contract management procedures must be followed, including the ongoing management of any intellectual property at the time of variations to the contract and after the contract has ended.

### DataVic Policy

The [DataVic Access Policy](https://www.data.vic.gov.au/policy-and-standards-0) applies to all Departments and Agencies. It is supported by the [DataVic Access Policy Guidelines](https://data.vic.gov.au/datavic-access-policy-guidelines). The intention of the DataVic Access Policy is to:

* enable public access to government data to support research and education;
* promote innovation;
* support improvements in productivity and stimulate growth in the Victorian economy; and
* enhansce sharing of, and access to, information rich resources to support evidence based decision making in the public sector.

The DataVic Access Policy Guidelines state that Agencies should secure contractual permission to release data by including a clause in the contract to facilitate making datasets available to the public.

As an intended departure from how other Intellectual Property is dealt with under the Intellectual Property Policy, the DataVic Access Policy Guidelines state that Agencies should negotiate contracts in which the ownership of all data, including any intellectual property rights, vest in the Agency upon the time of its creation. If an Agency does not wish to maintain ownership of a dataset, a contractual licence should be negotiated that permits the use, reuse and sharing of data.

Compliance with legislative and policy requirements (Instruction 7.2.1(f)) set down specific requirements for the State to take custody and ownership of geoscience data.

### Ownership and custody of geoscience data

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.

### Supplier Code of Conduct

The Victorian Government is committed to ethical, sustainable and socially responsible procurement. In ensuring that suppliers maintain the same values as the Government, the State has established a [Supplier Code of Conduct](https://buyingfor.vic.gov.au/supplier-code-conduct). The Code outlines ethical standards in behaviour that suppliers, as partners, will aspire to meet when conducting business with the State.

Agencies must ensure that suppliers have submitted the required commitment letters in relation to the Code either as part of the tender process or through prequalification.

Refer to [Supplier Code of Conduct](https://buyingfor.vic.gov.au/supplier-code-conduct) for more information.

### Commitments made by suppliers

To give contractual effect to commitments made by suppliers under Instruction 4.1.5, contracts for Works or Construction Services need to contain provisions that:

* 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.

### Shared reporting regime

Contracts for Works or Construction Services need to contain provisions that will comply with the shared reporting regime in Performance reporting and shared reporting regime (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.

### Disclosure of information

To give contractual effect to an Agency’s legal or policy requirements to disclose information, contracts for Works or Construction Services must grant the Agency sufficient rights to enable this disclosure to occur.

### Non-use of certain cladding products

Contracts must 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).

### Minimum rates of pay for tip truck owner drivers

When procuring Works that may require the use of tip trucks, Agencies must ensure that their contracts require any tip truck owner driver engaged in connection with excavation work, directly or indirectly, through one or more subcontractors, receives at least minimum rates of pay.

The minimum rates of pay that apply are based on the advisory [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 the Transport Industry Council.

The requirement applies to all tip truck owner drivers engaged on a project, whether the owner driver is engaged directly by the Contractor or indirectly through one or more subcontractors. Contractors will need to pass this requirement on through their supply chains.

The requirement provides flexibility for the method of payment to tip truck owner drivers:

* payment of hourly rates; or
* payment of per load rates.

The requirement for minimum rates of pay for tip truck owner drivers is intended to ensure tip truck owner drivers are paid a rate that will fully cover their operating costs, provide a return for their own labour and a return on their business investment. This will ensure they can cover their business costs and maintain their vehicles and that actions to obtain work do not create safety concerns which compromise the safety of all road users.

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) provide information about typical operating costs and specify hourly rates of pay. They form the basis against which the minimum contract rates of pay for owner drivers on Victorian Government construction projects can be determined. They do not provide advice on per load rates.

The Transport Industry Council has developed six tip truck rates and costs schedules for both new and used vehicles, which are required to be updated annually and published in the Government Gazette.

For vehicles over five years old, the minimum hourly rates published in the Schedule (as Gazetted in May 2018) are:

|  |  |
| --- | --- |
| **Vehicle type** | **Minimum hourly rate** |
| Tandem GVM 22.5 | $88.38 |
| Truck and Quad Axle Dog Trailer GCM 42.5 | $121.69 |
| Truck and Quad Axle Dog Trailer GCM 50 | $133.54 |

Practitioners should verify currency of rates at [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), when they undertake due diligence on compliance with this requirement.

Per load rates must be arrived at based on a reasonable estimate of the time likely to be required to complete a specific job, taking into account all of the relevant circumstances, multiplied by the minimum hourly rate and adjusted for any agreed incentive payment. The agreed incentive component, which is in addition to the minimum rate, may be reduced where agreed loads are not met.

For projects that impose additional project-specific requirements Agencies should consider a reasonable adjustment to be paid to tip truck owner drivers in addition to the minimum rates. Agencies should specify any proposed adjustment rate in the contract released at tender.

Example - to determine a per load daily rate:

Where the relevant hourly rate is $121.69 per hour, to arrive at contract load rates, typically 20 per cent should be added to the hourly rates. This is then converted to a daily rate that will be paid if the driver completes an agreed number of loads. The daily rate can be amended in accordance with the required number of hours for the project.

For a tip truck owner driver using a Truck and Quad Axle Dog Trailer GCM 42.5, over five years old, engaged through a hiring agency, the standard approach would be:

|  |  |  |  |
| --- | --- | --- | --- |
| Rates | Calculations | Values | Comment |
| Minimum hourly rate |  | $121.69 | Determined from [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) |
| Per load hourly rate | $121.69 x 1.20 | $146.03 | Adjust the hourly rate to determine per load hourly rate, in this example by increasing the hourly rate by an incentive component of 20 per cent |
| Per load daily rate | $146.03 x 9.0 | $1,314.27 | Multiply the load hourly rate by the number of work hours per day, in this example 9 hours |
| Payment including hiring agency fee | $1,314.27x 1.10 | $1,445.70 | Increase the per load daily rate by the value of the hiring agency fee, in this example 10 per cent |

Note: Tip truck owner drivers are generally engaged through a hiring firm. Hiring firms add an agency fee to the tip truck charge which is in the order of 10 per cent. It is important that this fee is not deducted from the required minimum payment to the owner drivers.

### Local Jobs First – Victorian Industry Participation Policy

The [Local Jobs First - Victorian Industry Participation Policy](https://localjobsfirst.vic.gov.au/) requires Agencies to consider competitive local suppliers, including small and medium sized enterprises, when implementing projects valued at:

* $1 million (exclusive of GST) or more in regional Victoria, or
* $3 million (exclusive of GST) or more in metropolitan Melbourne or for state-wide activities.

Victorian Industry Participation Policy Strategic Projects, which are projects valued at $50 million (exclusive of GST) or more (or as otherwise agreed by government) must meet minimum local content requirements determined on a case-by-case basis. Strategic Projects also have a requirement to maximise the use of local steel products from locally milled steel where relevant.

Minimum local content requirements can be set by the Minister for Industry and Employment for selected Strategic Project types:

* 90% for a construction project;
* 80% for a services project or a maintenance project; and
* 80% for the maintenance or operations phase of a Strategic Project.

Agencies must ensure that their Tender Documentation and contracts contain the relevant Local Jobs First - [Victorian Industry Participation Policy model clauses](https://localjobsfirst.vic.gov.au/agency-guidance/agency-guidelines).

### Local Jobs First - Major Projects Skills Guarantee

The [Local Jobs First - Major Project Skills Guarantee](https://localjobsfirst.vic.gov.au/) requires all publicly funded projects for certain Works valued at or over $20 million (exclusive of GST) to use Victorian apprentices, trainees, or engineering cadets for at least 10 per cent of the total estimated labour hours.

Agencies must ensure that their Tender Documentation and contracts contain the relevant Local Jobs First - [Major Projects Skills Guarantee model clauses](https://localjobsfirst.vic.gov.au/agency-guidance/agency-guidelines).

### Victoria’s Social Procurement Framework

Victoria’s [Social Procurement Framework](https://buyingfor.vic.gov.au/social-procurement-framework-and-guides) puts social and sustainable outcomes at the centre of the Government’s procurement activity.

The Framework applies to all Government departments and agencies and to procurement of all goods, services and construction. The Framework includes specific social and sustainable procurement objectives and corresponding outcomes.

All Agencies must apply Victoria’s Social Procurement Framework from 1 September 2018.

Agencies implement the Framework through individual procurement activities using a scalable approach based on expenditure.

*Regional under $1 million; Metro or State-wide under $3 million (values exclusive of GST)*

* Incorporate social objectives into regular procurement planning.
* Seek opportunities where available to directly or indirectly procure from social enterprises, Australian Disability Enterprises or Aboriginal businesses.

*Regional $1 to $20 million; Metro or State-wide $3 to $20 million (values exclusive of GST)*

* Incorporate social objectives into regular procurement planning.
* Use evaluation criteria (5 to 10 per cent weighting) to favour businesses whose practices support social and sustainable objectives.

*$20 to $50 million (values exclusive of GST)*

* Complete a Social Procurement Plan during procurement planning.
* Include performance standards and contract requirements that pursue social and sustainable objectives.

*Over $50 million (exclusive of GST)*

* Complete a Social Procurement Plan during procurement planning.
* Include targets and contract requirements that pursue social and sustainable objectives.

Refer to the [Social Procurement Framework](https://buyingfor.vic.gov.au/social-procurement-framework-and-guides) for more information, including guidance, registers and templates.

## Useful resources

Suite of Victorian Public Construction Contracts

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 27/08/2018 | Minimum rates of pay for tip truck owner drivers | New section inserted to describe the policy Minimum rates of pay for tip truck owner drivers on government projects | DTF |
| 2 | 18/10/2018 | Minimum rates of pay for tip truck owner drivers | For vehicles over 5 years old, the minimum hourly rates published in the Schedule updated to reflect the rates gazetted in October 2018Example to determine a per load daily rate updated to reflect the minimum hourly rate gazetted in October 2018. | DTF |
| 3 | 30/12/2018 | Victorian Industry Participation Policy | Update thresholds applying to this policy to reflect recent policy change. Thresholds are established at the project level, no longer at the contract level.Insert new paragraph noting that the responsible Minister can establish minimum levels of local content requirements for selected Strategic Project types. | DTF |
| 3 | 30/12/2018 | Major Projects Skills Guarantee | Update thresholds applying to this policy to reflect recent policy change. Thresholds are established at the project level, no longer at the contract level. | DTF |

# Non-Standard Commercial Arrangements

**Public Construction – Guidance 7.2.2
Effective date 1 July 2018**

**Objective:** To explain what Non-Standard Commercial Arrangements are and how they are approved

**Link to Direction:** Direction 7.2.2 Contractual terms and conditions
**and Instructions** Instruction 7.2.2 Contractual terms and conditions

## Summary

Commercial agreements may create precedents for future procurements undertaken by other Agencies. Contract terms or conditions that may materially impact future procurements require approval.

This Guidance describes what Non-Standard Commercial Arrangements are and when they require approval.

## What are Non-standard commercial arrangements

A Non-Standard Commercial Arrangement is a term or condition in a contract or deed, including the contents of binding schedules or annexures, that:

* in any way contravenes the Ministerial Directions or the Instructions; or
* in all of the circumstances is highly unusual for a procurement of that type and Procurement Model as procured by a prudent Agency;

and that is so material as to have potential to impact that market segment generally or contracting practices by the State of Victoria as a whole.

For example, a contract that:

* does not satisfy a mandatory Government policy;
* does not require standard insurances commonly used in that industry sector; or
* contains unique arrangements (for example, industrial arrangements) not commonly used in that industry sector.

## Approval of Non-standard commercial arrangements

Where non-standard commercial arrangements are being considered these must only be proposed or agreed to by the Agency following approval by the Secretary of the Department of Treasury and Finance or a person authorised in writing by the Secretary.

The Accountable Officer should request approval in writing to the Secretary to the Department of Treasury and Finance, or a person authorised in writing by the Secretary, specifying:

* the nature of the proposed arrangement;
* how the proposed arrangement arose; and
* reasons why the proposed arrangement should be approved.

# Debrief for tender participants

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

**Objective:** To establish greater transparency for the market about government procurement

**Link to Direction:** Direction 8.1 Debrief for tender participants
**and Instructions** Instruction 8.1 Debrief for tender participants

## Summary

Agencies must inform all tender participants of the outcome of a tender.

Agencies must offer a debrief to all tender participants in the tender process and, if requested, ensure a debrief is provided promptly.

This Guidance describes factors to consider when debriefing tender participants.

## Debriefing tender participants

Debriefing is the process by which an Agency provides participants with feedback on their tender submissions. A debrief is available to both successful and unsuccessful participants.

The debrief process helps to identify areas where participants can improve. It gives participants the chance to ask questions to improve their knowledge and understanding of the Agency and government procurement. Debriefs provide the Agency with the opportunity to be fully accountable and transparent and demonstrate that the procurement was conducted fairly. Debriefs provide feedback both ways – they provide an opportunity to receive feedback from participants.

A debrief generally occurs at the end of the tender process - that is, after the contract has been executed with the successful participant.

Advising unsuccessful participants of the outcome of the procurement is different from a debrief. Advising the outcome is specifically about letting participants know they were unsuccessful, rather than providing a more detailed debrief about the reasons.

The opportunity to receive a debrief needs to be included in the Tender Documentation.

## Do’s and don’ts for debriefing

The debrief should not disclose any other tender participant’s confidential or commercial in confidence information, but should help the tender participant to improve future responses.

The debrief provides an opportunity to answer the tender participant’s questions and to respond to any concerns. At a minimum the debrief should cover:

* the reason(s) the response was not successful;
* the quality of the tender participant’s response against the selection criteria, pre-qualification criteria and its relative strengths and weaknesses; and
* what the participant could do to improve future responses.

The form of the debrief should recognise the tender participant’s preference and the nature of the procurement. The debrief may be undertaken by phone, email, letter or at a face-to-face meeting.

The debrief should be provided promptly after it has been requested.

For complex and high value or high risk procurements, a face-to-face meeting is the best way to have an effective debrief and should be offered to tender participants as a matter of course.

After the debrief, write a summary of the meeting and record it with the procurement documents.

# Supplier performance and shared reporting regime

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

**Objective:** To provide information on a supplier’s performance to help when selecting suppliers and to encourage positive supplier performance

**Link to Direction:** Direction 8.2 Supplier performance and shared reporting regime
**and Instructions** Instruction 8.2 Supplier performance and shared reporting regime

## Summary

Public Construction Procurement starting on or after 1 July 2018 must comply with supplier performance and shared reporting requirements.

Agencies must assess how suppliers perform using the template nominated by the Secretary to the Department of Treasury and Finance 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.

Suppliers engaged under contracts that comply with the Partnerships Victoria Requirements or the Victorian Alliancing Policy are assessed in the manner described in the relevant policy.

Agencies must report on how suppliers perform. Completed reports must be submitted to the website or system nominated by the Secretary to the Department of Treasury and Finance.

This Guidance will help Agencies to maintain effective supplier performance reporting.

## What to do before signing a contract

Before entering into an arrangement with a supplier:

* properly analyse the need for the procurement, including its functional and performance requirements;
* clearly define the outcomes desired from the procurement;
* establish performance indicators that are consistent with the form of contract used;
* obtain/maintain and refer to records of past supplier performance;
* include clauses in the contract that allow for in-contract evaluations, monitoring procedures and performance measurement; and
* include clauses in the contract that allow performance assessment information to be collected and for permission to use the information in other projects.

## When are assessments of supplier performance required?

Public Construction Procurement starting on or after 1 July 2018 must comply with supplier performance and shared reporting requirements.

Shared reporting is required for suppliers of Works or Construction Services engaged under:

* contracts for Works (including buildings, infrastructure and demolition);
* contracts for Construction Services;
* contracts entered into with suppliers sourced from Registers; and
* contracts made under standing offer arrangements or Supplier Panels (for example, by way of a purchase order issued under the standing offer arrangement). This requirement includes purchase order contracts made under State Purchase Contracts and Sole Entity Purchase Contracts where the services relate to Public Construction.

Legally, types of contracts include:

* contracts under seal (also known as deeds); and
* simple contracts (can be oral, or written, or a combination of both).

Formally assess suppliers of Works:

* 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 a significant issue affecting supplier performance arises.

Formally assess suppliers of Construction Services:

* every six calendar months from the start of the engagement over the term of the engagement, when the expected duration of the contract engaging the supplier 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 a significant issue affecting supplier performance arises.

Assess how suppliers perform under contracts that comply with the Partnerships Victoria Requirements or the Victorian Alliancing Policy in the manner described in the policy applying to the supplier.

Assess how each individual supplier performed when suppliers are engaged under a joint venture. This is necessary as joint ventures are generally project specific and an assessment of a joint report would be hard to refer to in the future.

If a periodic assessment for suppliers of Works or Construction Services is due to fall within two calendar months of a milestone report, the milestone report supersedes the need to prepare the periodic report.

## What is reviewed in a shared reporting assessment?

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

* for suppliers of Works – the value of the contract engaging the supplier is $500,000 (inclusive of GST) or more; or
* for suppliers of Construction Services – the value of the contract engaging the supplier is $200,000 (inclusive of GST) or more.

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 the values listed above.

A mediated or negotiated outcome to a dispute may impact what is presented in a performance report if the outcome of the mediation or negotiated is subject to a confidentiality agreement. The subject of a confidential mediated or negotiated outcome should not be discussed in the performance report. Other sections of the performance report should be completed in the normal manner.

## How are records of performance assessment stored and used?

Agencies must report on how suppliers perform. Completed reports must be submitted to the website or system nominated by the Secretary to the Department of Treasury and Finance.

Records of supplier performance are held centrally and are accessible for use by practitioners when:

* selecting potential participants in a Selective Tender or Limited Tender process; or
* determining how a supplier performed on earlier projects when evaluating an open, Selective Tender or Limited Tender, in a similar way to a reference check.

## Keep suppliers informed and involved

Suppliers need to be made aware from the outset that their performance will be assessed and recorded. They should be advised of the performance criteria, how they will be measured, when they will be assessed, how performance assessments will be recorded and who will have access to such information.

The performance assessment process should allow for constructive two-way discussion so that both the supplier and the Agency receive feedback on ways to improve. Suppliers must be given an opportunity to comment on the performance assessment. As this is an opportunity not an obligation on the supplier, this opportunity should be limited to a period of 10 business days.

## Effective supplier performance monitoring

Shared reporting looks at more than whether a contract has been delivered on time, budget and within the specified quality parameters. Shared reporting also considers relationships and how the contract is managed.

Shared reporting processes will help develop strong partnerships with industry through:

* adopting and committing to co-operative working relationship;
* a non-adversarial approach to dispute resolution with arbitration or litigation reserved as a last resort; and
* a supplier’s right of reply during the performance assessment and the opportunity for the supplier to explain how it will mitigate past poor performance.

Effective performance monitoring and management requires:

* regularly checking the supplier’s performance to ensure contractual obligations are being met;
* providing constructive feedback progressively to the supplier, so there are no surprises at the end of the process (identify and respond promptly to any contractual issues and advise the supplier in writing if dissatisfied with any aspect of performance under the contract;
* seek progressive feedback from the supplier on how Agency is performing and where appropriate address such issues);
* where appropriate, requesting progressive feedback from stakeholders and making the feedback available to the supplier;
* keeping records of all dealings with the supplier and of the administration of the contract (for example, file notes of inspections, telephone conversations, records of meetings and documented invoice processing) – this may include recording the performance outcomes in external databases; and
* providing a copy of performance reports to the supplier and inviting the supplier to respond to (or acknowledge they have received) the report.

## Useful resources

[Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994) Guidance 4.2.1

Sets out performance expectations to be included in contract and for performance monitoring, evaluation and reporting.

[National Framework for Traditional Contracting: Topic Specific Guide 4 Performance and Continuous Improvement](https://infrastructure.gov.au/infrastructure/ngpd/files/NFTC_TSG4_Performance.pdf) (Department of Infrastructure and Regional Development, September 2015)

Provides guidance on establishing a formal performance assessment framework.

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| --- | --- | --- | --- | --- |
| **Revision** | **Date** | **Reference** | **Details** | **Endorsed by** |
|  |  1/07/2018 |  | First release |  |
| 1 | 30/12/2018 | What is reviewed in a shared reporting assessment? | Add the words ‘In addition to any other means of assessing how suppliers perform,’ at the beginning of the paragraph.Insert a new paragraph clarifying how to assess how a supplier performed when a mediated or negotiated outcome to a dispute may impact what is presented in a performance report. | DTF |

# Complaints

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

**Objective:** To establish greater transparency for the market about government procurement outcomes

**Link to Direction:** Direction 8.3 Complaints
**and Instructions** Instruction 8.3 Complaints

## Summary

Consider and respond to complaints promptly and impartially.

Establish appropriate processes to respond to complaints.

This Guidance describes the factors Agencies should address when developing a complaint handling process.

## Complaint handling process

A supplier or tender participant may complain to an Agency if it believes the Agency has not conducted its procurement process in accordance with the law, International Agreements, Government policy, Agency policies and procedures or these Directions and Instructions.

Agencies must establish appropriate processes to respond to complaints raised by suppliers or tender participants (including potential tender participants) about their conduct of Public Construction Procurement.

The Victorian Government Purchasing Board has prepared a [Complaints management – Goods and services procurement guide](https://buyingfor.vic.gov.au/complaints-management-goods-and-services-procurement-guide). This procedure sets out:

* the requirement for Agencies to establish a complaint management system;
* appropriate timelines for responding to a complaint; and
* processes for handling complaints.

Agencies may choose to apply a similar process for complaint handling related to Public Construction Procurement, noting that complaints about Public Construction Procurement will not be escalated to the Victorian Government Purchasing Board.

## Investigating complaints

Investigate all complaints promptly. Following the investigation, take appropriate action. The response to a complaint may include an:

* internal investigation; or
* external / independent investigation.

Following the investigation take appropriate such as:

* providing a considered reply to the complainant;
* modifying processes for future tenders (where appropriate);
* taking action under the appropriate code of conduct; or
* terminating a procurement or contract and starting again.

If the Agency’s response to the complainant fails to satisfy their concerns, the complainant may escalate their complaint. For certain complaints, a complainant is not required to refer the matter to the Agency prior to referring the complaint to an external body. Agency procurement processes may be subject to review by the Victorian Auditor-General, the Ombudsman, the Independent Broad based Anti-corruption Commission, the police and the courts. The complainant may have legal rights to redress, for example for breach of contract. Agencies must cooperate with any hearing or review of a complaint by a competent authority.

To maintain high standards of probity, handle complaints in a consistent, fair and transparent way. Complaints will ideally be resolved - to the satisfaction of both parties - within the Agency. Escalating complaints to external bodies can result in added costs and delays in delivering a procurement.

## Maintaining good records

It is important that Agencies maintain good records of the procurement process and decisions. Procurement is a competition and there will be winners and losers. Agencies should be able to justify the selection and to show fairness and impartiality in that process.

## Useful resources

[Complaints: Good Practice Guide for Public Sector Agencies](https://www.ombudsman.vic.gov.au/Publications/Guidelines/Complaints-Good-Practice-Guide-for-Public-Sector) (Ombudsman Victoria, September 2016)

Describes good practice management of complaints.

# Responsibilities of the Accountable Officer

**Public Construction – Guidance 10.1
Effective date 1 July 2018**

**Objective:** To explain the process of attestation and outline what would constitute a compliance deficiency and a material compliance deficiency for reporting purposes

**Link to Direction:** Direction 10.1 Responsibilities of the Accountable Officer
**and Instructions**

## Summary

Agencies must establish effective governance frameworks for Public Construction Procurement, that are appropriately scaled to the profile of the Public Construction Procurement undertaken.

The Accountable Officer of a Portfolio Department is responsible for:

* establishing appropriate requirements for the conduct of Public Construction Procurement by Excluded Entities (where the portfolio includes Excluded Entities);
* supporting Portfolio Agencies to perform Public Construction Procurement; and
* reporting matters relating to portfolio entities.

The Agency’s Accountable Officer is required to attest compliance with the Directions in the Agency’s annual report.

The Agency’s audit committee, or equivalent review mechanism, must be satisfied with the attestation of compliance with the Directions.

This Guidance describes governance frameworks for Public Construction Procurement and compliance attestation requirements.

## Establish governance framework for Public Construction Procurement

Agencies must develop appropriate and effective governance frameworks to ensure compliance with these Directions. This includes establishing appropriate record management systems.

The framework established is scalable and needs to reflect the size, frequency and complexity of the Public Construction Procurement the Agency undertakes.

Where an Agency does not undertake Public Construction Procurement, it does not need to establish governance frameworks for Public Construction Procurement.

## Requirements of the Accountable Officer

### General requirements of the Accountable Officer

Ensuring compliance with the [Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994) requires Public Construction Procurement to be managed in accordance with the requirements of the Directions for Public Construction Procurement. The Responsibilities of the Accountable Officer (Direction 10.1) requires the Accountable Officer, to the extent relevant to operations, to:

ensure the Agency is appropriately resourced with staff qualified and skilled to undertake Construction Procurement;

establish appropriate and effective governance frameworks to ensure compliance with the Directions including appropriate record management systems;

ensure responsibility, authority and accountability for Public Construction Procurement is defined and allocated within the Accountable Officer's operating frameworks, including documenting:

who is responsible for monitoring compliance with the Directions and ensuring systems and processes to support the Directions are in place; and

who is responsible and accountable for decision making and any approvals required under the Directions;

ensure that exemptions from the Directions and Instructions are sought and dealt with appropriately.

### Portfolio relationship

Under section 13A of the **Public Administration Act 2004 (Vic)**, the Department Head (Secretary) is responsible for advising the portfolio Minister on matters relating to relevant portfolio entities and for working with and providing guidance to these entities.

Consistent with this role, Department Heads are expected to advise the portfolio Minister if any significant construction procurement issues relating to their relevant public entities arise. This requirement is separate to attestation.

### Establish requirements for Public Construction Procurement for Excluded Entities

The Portfolio Department is required to establish appropriate requirements for the conduct of Public Construction Procurement by the Excluded Entities. Refer to Portfolio Department responsibilities for Excluded Entities (Direction 1.3.4).

This is intended to ensure that the requirements, including any accountability requirements, are scalable and appropriate for the nature of Works or Construction Services that Excluded Entities undertake.

### Support Portfolio Agencies to perform construction procurement

For Portfolio Agencies that are not Excluded Entities, the Portfolio Department plays a support role, with the Accountable Officer of the relevant Portfolio Department retaining overarching accountability for ensuring Portfolio Agencies implement the Directions. See Agencies that must comply with these Directions (Direction 1.3.2).

This is intended to promote consistency of practice and to allow the Portfolio Department to provide relevant information to the Responsible Minister regarding Public Construction Procurement undertaken across the portfolio.

## Annual attestation of compliance with Directions

### Standing Directions 2018 made under the Financial Management Act

Accountability for compliance with the Directions is held by the Accountable Officer or the Responsible Body. Attestation is directed by the [Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994) at Standing Direction 5.

Standing Direction 4.2.4 Public Construction Accountability requires the Agency to apply the Ministerial Directions for Public Construction Procurement. Standing Direction 4.2.4 is effective from 1 July 2018.

Standing Direction 4.2.1 Acquisition of assets, goods and services (and the supporting Instruction 4.2.1 and Guidance 4.2.1), covers a range of activities including procuring goods and services (including commissioning), and investing in assets and infrastructure and established performance and financial standards and processes to be met. Standing Direction 4.2.1 is effective from June 2016.

### Annual attestation of compliance with Directions

The Directions for Public Construction Procurement are reinforced by the [Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994), which set out a number of relevant matters including the requirement to demonstrate compliance with the Directions for Public Construction Procurement. This takes the form of a public attestation by the Accountable Officer (or board of a public sector agency) published in the Agency’s annual report.

The organisation’s audit committee, or an alternative review mechanism when there is no audit committee, must be satisfied with the view expressed in the attestation before finalising the attestation.

Attestation of compliance with the Directions for Public Construction Procurement is subject to transitional arrangements. For the 2018-19 year attestation against Standing Direction 4.2.4 applies as at 30 June 2019, that is attestation is required for that specific date, instead of applying to the whole financial year 2018-19. This transitional provision provides Agencies an extended period in which to adapt systems and processes to meet the requirements of the Directions. For clarity, attestation against all other Standing Directions applies for the full period 2018-19.

Attestation against Standing Direction 4.2.4 applies as described in the [Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994) – that is attestation is made over the entire period – from the 2019-20 year forward, together with attestation against all other Directions.

The [Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994) also require Agencies to assess any compliance deficiencies and report material compliance deficiencies as part of the attestation.

## Useful resources

[Compliance attestation checklist](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994)

Checklist of mandatory items in the Standing Directions of the Minister for Finance 2016. It is designed to help with monitoring, reporting on and attesting to compliance.

[Checklist – mandatory requirements of the Directions and Instructions](https://www.buyingfor.vic.gov.au/construction-document-library)

This checklist details the mandatory requirements to be met to allow for full attestation of compliance with the Directions for Public Construction Procurement.

[Agency Compliance Report template](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994)

This template has been developed for use by Agencies reporting annual compliance outcomes against the [Standing Directions 2018 under the Financial Management Act 1994](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-2018-under-financial-management-act-1994) to their Portfolio Department.

Relevant yearly [Model (Annual) Report](http://www.dtf.vic.gov.au/Government-Financial-Management/Financial-reporting-policy/Model-report)

Provides a guide when preparing the annual report, including how to make an attestation.

[Fact sheet - Comparison of 2016 and 2018 Ministerial Directions for Public Construction](https://www.buyingfor.vic.gov.au/construction-fact-sheets)s

Describes where the 2016 Directions have been incorporated into the 2018 Directions and gives a summary of what has changed.

# Delegation

**Public Construction – Guidance 10.2
Effective date 1 July 2018**

**Objective:** To explain the requirements for exercising a delegation under the Directions and Instructions

**Link to Direction:** Direction 10.2 Delegation
**and Instructions**

## Summary

The Accountable Officer may delegate responsibilities under the Directions, with the exception of certifying Special Circumstances under Limited Tenders Instruction 3.2.2(j).

This Guidance explains the requirements for delegating responsibilities.

## Requirements for delegating responsibilities

The Accountable Officer has a number of responsibilities under the Directions and the Instructions. Consistent with the overarching principles in the **Public Administration Act 2004 (Vic)** the Directions provide that the Accountable Officer may delegate those responsibilities, other than the power of delegation and the certification of Special Circumstances under Limited Tenders Instruction 3.2.2(j).

Delegation of responsibilities is consistent with the principle of accountability and ensuring that accountability for procurement outcomes is aligned with appropriate levels of authority and responsibility. From a practical perspective, it also enables efficiency in procurement governance.

Under the Directions and Instructions references to Accountable Officers include delegates, by operation of Ministerial Direction 10.2. Accountable Officers may wish to give standing delegation for particular types of decisions.

The delegate must:

* be an executive employed by the Agency; and
* be appropriately qualified or experienced to perform the delegated function.

Where the scope of a delegation includes determining the use of Limited Tenders the delegate may need experience in construction procurement or procurement more generally, or access to suitable advisers.

## Limited Tenders where Special Circumstances exist

Limited Tenders (Instruction 3.2.2) sets out the Special Circumstances that may justify using a Limited Tender.

Special Circumstance 3.2.2(j) refers to: 'exceptional circumstances as certified by the Responsible Minister or Accountable Officer'.

Special Circumstance 3.2.2(j) cannot be delegated. Agencies seeking to rely on this Special Circumstance will need to refer the matter to the Accountable Officer or Responsible Minister to certify that the exceptional circumstances exist.