

Ministerial Directions for Public Construction Procurement in Victoria

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Introduction to the Ministerial Directions

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

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

Victoria's broader public governance, financial management and accountability framework

These Directions are part of Victoria's broader public governance, financial management and accountability framework. They are intended to complement the broader framework, and should be read in conjunction with the requirements of this broader framework. These Directions set out the requirements applicable to Public Construction Procurement in Victoria. Public Construction Procurement includes both Works and Construction Services.

Some Agencies that must comply with these Directions must also comply with the Victorian Government Purchasing Board's supply policies, which apply to non-construction procurement. It is for the Accountable Officer of the relevant Agency to decide whether and how to align internal governance frameworks for procurement, noting that where these Directions are inconsistent with the requirements of a supply policy issued by the Victorian Government Purchasing Board, the requirements of these Directions prevail in relation to Public Construction Procurement.

Key elements of Victoria's broader public financial management and governance framework:

Legislation:

- **Audit Act 1994 (Vic)**
- **Financial Management Act 1994 (Vic)**
- **Independent Broad-based Anti-corruption Commission Act 2011 (Vic)**
- **Project Development and Construction Management Act 1994 (Vic)**
- **Public Administration Act 2004 (Vic)**

Ministerial Directions and equivalent issued under legislation:

- Victorian Public Sector codes of conduct issued by the Victorian Public Sector Commission under the **Public Administration Act 2004 (Vic)**.
- The Standing Directions of the Minister for Finance issued under the **Financial Management Act 1994 (Vic)** along with the associated Instructions and Guidance issued by the Department of Treasury and Finance.
- Ministerial Directions issued under the **Project Development and Construction Management Act 1994 (Vic)** and the associated Instructions and Guidance issued by the Department of Treasury and Finance.

- The supply policies issued by the Victorian Government Purchasing Board under Part 7A of the **Financial Management Act 1994 (Vic)**.

Frameworks:

- Asset Management Accountability Framework;
- Victoria's Social Procurement Framework;
- Victoria's Value Creation and Capture Framework; and
- High Value High Risk Project Assurance Framework.

Policies:

- Policies applicable to procurement delivery methods:
 - Partnerships Victoria Requirements,
 - Victorian Alliancing Policy, and
 - Market-Led Proposals Guideline.
- Victorian Supplier Code of Conduct.

Guidance:

- Investment Lifecycle and High Value/High Risk Guidelines.

Ministerial Directions for Public Construction Procurement in Victoria

1. Purpose and application

1.1 Purpose of these Directions

The purpose of these Directions is to support efficient, economical, and effective delivery of Public Construction Procurement in Victoria consistent with the principles set out in Direction 1.2.

1.2 Guiding Principles

When undertaking Public Construction Procurement in accordance with these Directions, Agencies must act in a manner consistent with the following procurement principles:

- (a) value for money, taking into account —
 - (i) the total benefits and costs over the life of the goods, services or works procured;
 - (ii) environmental, social and economic factors; and
 - (iii) any risk related to the procurement;
- (b) accountability for procurement commensurate with appropriate levels of authority and responsibility;
- (c) probity through the application of integrity, ethical behaviour, fairness and transparency in the conduct of procurement processes;
- (d) 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.

The procurement principles are supported by the following construction procurement principles:

- (a) ensuring appropriate competition and contestability when undertaking Public Construction Procurement;
- (b) employing the appropriate Procurement Models and processes taking account of the complexity and value of the project and supplier market capability;
- (c) appropriately planning and managing Public Construction Procurement to deliver procurement objectives;
- (d) reducing unnecessary burden of Public Construction Procurement for all parties;
- (e) encouraging appropriate innovation and responsiveness in the supplier market;

- (f) fostering continuous improvement and building appropriate skills and capability in the conduct of Public Construction Procurement;
- (g) conducting Public Construction Procurement in an open and transparent manner ensuring defensibility of processes;
- (h) treating all tender participants fairly and equally;
- (i) conducting Public Construction Procurement in an efficient and timely manner; and
- (j) undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

These principles inform these Directions and are identified to highlight the purpose behind the Direction, but are not independent obligations.

1.3 Application of these Directions and the Instructions

1.3.1 Application of these Directions

- (a) These Directions apply to Public Construction Procurement undertaken by or on behalf of an Agency.
- (b) For the purposes of these Directions, Public Construction Procurement does not include:
 - (i) grants (whether in the form of a contract, conditional gift or deed), sponsorship or donations;
 - (ii) investments (or divestments);
 - (iii) sales of any asset by tender;
 - (iv) obtaining or making any loans;
 - (v) procurement of goods or services for resale or procurement of goods and services used in the production of goods for resale;
 - (vi) any property right not acquired through the expenditure of relevant money (for example, a right to pursue a legal claim for negligence);
 - (vii) statutory appointments;
 - (viii) appointments made by a minister using the executive power (for example, the appointment of a person to an advisory board);
 - (ix) the engagement of employees: or
 - (x) acquisition of Works or Construction Services from another public body or government owned entity (including those of the Commonwealth, States, Territories, or local government), except where the public body or government owned entity is a participant in a competitive tender process.

1.3.2 Agencies that must comply with these Directions

- (a) All Agencies, except for Excluded Entities, must comply with these Directions.
- (b) A Portfolio Department must, in respect of any Portfolio Agency that is not an Excluded Entity:
 - (i) provide advice and support to the Portfolio Agency in relation to complying with these Directions; and

- (ii) support the Responsible Minister in the oversight of Portfolio Agencies and the Responsible Minister's portfolio as a whole, including providing information to the Responsible Minister concerning their Portfolio Agencies' Public Construction Procurement activities.

1.3.3 Excluded Entities

- (a) For the purposes of these Directions, the following Agencies are Excluded Entities:
 - (i) any school council constituted under Part 2.3 of the **Education and Training Reform Act 2006 (Vic)**;
 - (ii) any incorporated committee of management, unless the committee is listed in the Instructions;
 - (iii) any class B cemetery trust constituted under section 6 of the **Cemeteries and Crematoria Act 2003 (Vic)**;
 - (iv) any 'registered unit' as defined in the **Victoria State Emergency Service Act 2005 (Vic)**; and
 - (v) any 'volunteer brigade' as defined in the **Country Fire Authority Act 1958 (Vic)**.
- (b) Excluded Entities must undertake Public Construction Procurement in accordance with the requirements established pursuant to Direction 1.3.4.

1.3.4 Portfolio Department responsibilities for Excluded Entities

- (a) The following Agencies must establish appropriate requirements for Public Construction Procurement undertaken by Excluded Entities:
 - (i) in respect of the Excluded Entities in Direction 1.3.3(a)(i) to 1.3.3(a)(iii), the Portfolio Department of the Excluded Entity; and
 - (ii) in respect of the Excluded Entities in Direction 1.3.3(a)(iv) and 1.3.3(a)(v), the Victoria State Emergency Service and Country Fire Authority respectively.
- (b) These requirements must:
 - (i) be consistent with the principles set out in Direction 1.2;
 - (ii) take account of the requirements of these Directions, including the Instructions;
 - (iii) be consistent with the Excluded Entity's governing legislation; and
 - (iv) include appropriate accountability arrangements and monitoring of the Excluded Entity's Public Construction Procurement activities by the Agency responsible for issuing the requirements to ensure the Excluded Entity's compliance with the requirements.

1.4 Exemptions

1.4.1 Exemptions by the Minister from the Directions or Instructions

- (a) The Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)** may, in writing, exempt an Agency or class of Agencies from specific or all requirements in these Directions and Instructions.

- (b) An exemption by the Minister may be:
 - (i) for a specified time period or on an ongoing basis;
 - (ii) with or without conditions; or
 - (iii) in respect of a project or class of projects.

1.4.2 Exemptions by the Secretary from the Instructions

- (a) The Secretary may, in writing, exempt an Agency or class of Agencies from specific or all requirements in the Instructions.
- (b) An exemption by the Secretary may be:
 - (i) for a specified time period or on an ongoing basis;
 - (ii) with or without conditions; or
 - (iii) in respect of a project or class of projects.

1.4.3 Exemption procedures

- (a) Exemptions must be requested in accordance with Instruction 1.4.
- (b) The Secretary must maintain a record of exemptions provided under this Direction.

2. International Agreements

Principles

Value for money and probity are procurement principles that are specifically relevant to International Agreements.

Of particular relevance to this Direction are the following construction procurement principles:

- ensuring appropriate competition and contestability when undertaking Public Construction Procurement; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and mandatory requirements of these Directions.

2.1 Complying with International Agreements

If the requirements of an International Agreement apply to an Agency when undertaking Public Construction Procurement, the Agency must ensure that it complies with the additional requirements set out in Instruction 2.1.

Each agency is responsible for ensuring that it confirms whether Instruction 2.1 applies to the engagement of a supplier to perform Works or Construction Services.

3. Tendering requirements

Principles

Value for money, scalability and probity are procurement principles that are specifically relevant to tender preparation and processes.

Of particular relevance to this Direction are the following construction procurement principles:

- appropriately planning and managing Public Construction Procurement to deliver procurement objectives;
- employing the appropriate Procurement Models and processes taking account of the complexity and value of the project and supplier market capability;
- reducing unnecessary burden of Public Construction Procurement for all parties;
- encouraging appropriate innovation and responsiveness in the supplier market;
- ensuring appropriate competition and contestability when undertaking Public Construction Procurement;
- conducting Public Construction Procurement processes in an efficient and timely manner;
- treating all tender participants fairly and equally; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

3.1 Tender preparation and planning

Before starting a process to engage a supplier to perform Works or Construction Services, Agencies must ensure that appropriate preparation and planning are undertaken to guide the tender process from tender development to contract award, as well as for project delivery and contract management. Planning should be an active process that responds to changes in the delivery environment and informs decision making throughout the tender process and project delivery.

The amount of preparation undertaken should be in line with the risk and complexity of the procurement. While there is no one-size-fits all approach, the preparation should ensure the following matters are addressed at the appropriate time:

- (a) clear procurement objectives;
- (b) market analysis, market sounding and engagement strategy;
- (c) tender strategy;
- (d) key dates and time periods during the tender process;
- (e) tender evaluation and the evaluation process;
- (f) management of probity;
- (g) contract management; and
- (h) governance and resourcing.

3.2 Competition and contestability

To promote competition and contestability, when engaging a supplier to perform Works or Construction Services, Agencies must use:

- (a) an open tender;
- (b) a Selective Tender open to:
 - (i) all suppliers in the relevant category of a Register; or
 - (ii) at least three suppliers in the relevant category of a Register; or
- (c) a Limited Tender conducted in accordance with the Instructions.

3.3 Promoting efficiency in the tender process

Tender processes involve time and cost for suppliers and the procuring Agency. When engaging a supplier to perform Works or Construction Services, Agencies must ensure the tender process:

- (a) is appropriate for the Procurement Model and, to the extent practicable, is consistent with the way in which the Agency conducts comparable processes;
- (b) is conducted in an efficient and timely manner; and
- (c) is structured in a way that takes account of the cost of participating in a tender process for both tender participants and the Agency and seeks to reduce unnecessary transaction costs for all participants.

3.4 Tender Notices

To promote competition and contestability, and to ensure open and fair competition, when advertising a tender to perform Works or Construction Services, Agencies must provide potential tender participants with appropriate notice of the tender process, including issuing a Tender Notice in accordance with the Instructions.

3.5 Tender open times

Agencies must ensure tender participants are allowed a reasonable time period to respond to a tender following the publication of the Tender Notice. In determining a reasonable time period, Agencies should take into account:

- (a) the nature and complexity of the Works or Construction Services being procured;
- (b) the tender strategy and Procurement Model;
- (c) the likely tender participants and market characteristics, including whether it will be necessary for potential tender participants to establish consortia, or likely interest from international participants;
- (d) the time required for participants to undertake site visits or other investigation (if applicable);
- (e) the time required for participants to obtain quotes from their sub-contractors and suppliers; and
- (f) the complexity of the Tender Documentation and the need for participants to obtain professional advice, and the complexity of responses sought from participants.

3.6 Tender Documentation

- (a) Agencies must ensure that Tender Documentation is appropriate for the tender process and Procurement Model. To the extent practicable, Agencies should use Tender Documentation and processes that are standard in the industry and promote consistency of tender processes when engaging suppliers to perform comparable Works or Construction Services.
- (b) Tender Documentation released to the market must be drafted to promote open and fair competition by providing all potential participants in the tender process with access to the same information about the tender process and the Works or Construction Services the Agency is seeking.
- (c) Agencies must ensure that Tender Documentation is clearly drafted and provides participants (and potential participants) with the information they need to understand the requirements of the relevant stage of the tender process, including the matters set out in Instruction 3.6.1(c) and as otherwise required by these Directions.
- (d) Before beginning a tender process, Agencies must ensure the Tender Documentation is sufficiently resolved to minimise the need for addenda or changes during the tender process.

3.7 Evaluation criteria

3.7.1 Evaluation plan

- (a) Agencies must consider how responses for the relevant stage of the tender process will be evaluated before releasing Tender Documentation to the market to ensure the information requested and the evaluation plan are aligned.
- (b) Agencies must ensure the evaluation plan is:
 - (i) substantively complete before the release of Tender Documentation; and
 - (ii) finalised before the tender closing date.

3.7.2 Disclosure of evaluation criteria

- (a) Evaluation criteria must be disclosed in the Tender Documentation.
- (b) Any mandatory criteria must be indicated in the Tender Documentation.

3.7.3 Mandatory evaluation criteria

Agencies must ensure that any supplier engaged to perform Works or Construction Services satisfies the mandatory evaluation criteria as required by the Instructions prior to entering into the engagement.

3.7.4 Determining evaluation criteria

Evaluation criteria should be linked to the project's objectives to enable the Agency to evaluate which tender represents the best value for money. Agencies must select evaluation criteria, as part of preparing the evaluation plan, before releasing Tender Documentation to the market.

4. Managing probity requirements

Principles

Probity is specifically identified in the procurement principles.

Of particular relevance to this Direction are the following construction procurement principles:

- treating all tender participants fairly and equally;
- conducting Public Construction Procurement in an open and transparent manner ensuring defensibility of processes; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

4.1 Probity requirements

When undertaking Public Construction Procurement, Agencies must:

- (a) conduct Public Construction Procurement in a manner that is consistent with Public Sector Values;
- (b) treat tender participants (and potential tender participants) fairly and equally, and avoid giving one tender participant an improper advantage over another;
- (c) maintain confidentiality of participants confidential information, including commercially sensitive information and intellectual property;
- (d) ensure tender processes, negotiations, evaluation processes, and contract management processes are auditable, transparent and accountable; and
- (e) proactively identify and manage conflicts of interest whether real, potential or perceived appropriately and in accordance with applicable legal and policy requirements, including applicable Victorian Public Sector codes of conduct.

4.2 Managing probity in Public Construction Procurement

Agencies must have appropriate systems in place to ensure probity for all Public Construction Procurement including where required by the Instructions:

- (a) a probity plan; and
- (b) using a probity practitioner.

5. Transparency in Public Construction Procurement

Principles

Transparency in public procurement is an element of the probity procurement principle.

Of particular relevance to this Direction are the following construction procurement principles:

- conducting Public Construction Procurement in an open and transparent manner ensuring defensibility of processes;
- ensuring appropriate competition and contestability when undertaking Public Construction Procurement;
- encouraging appropriate innovation and responsiveness in the supplier market;
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

5.1 Forward notices

Agencies must publish forward notice of all upcoming tender processes for Works or Construction Services in accordance with the Instructions to promote competition and allow potential tender participants to plan for and allocate resources to participating in tender processes.

5.2 Publishing the details of procurements undertaken

- (a) Agencies must publish the outcome of each tender process to engage a supplier to perform Works or Construction Services, along with key details of the tender process and engagement in accordance with the Instructions.
- (b) In addition to complying with Instruction 5.2.1, Agencies that must comply with Financial Reporting Directive 12B must publish contracts for Works or Construction Services under that Directive.

6. Registers and Supplier Panels

Principles

Value for money and scalability are procurement principles that are specifically relevant to prequalification Registers and Supplier Panels.

Of particular relevance to this Direction are the following construction procurement principles:

- employing the appropriate Procurement Models and processes taking account of the complexity and value of the project and supplier market capability;
- reducing unnecessary burden of Public Construction Procurement for all parties
- ensuring appropriate competition and contestability when undertaking Public Construction Procurement;
- conducting Public Construction Procurement processes in an efficient and timely manner; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

6.1 Use of Registers and Supplier Panels

- (a) When conducting a Selective Tender or engaging a supplier from a Register or Supplier Panel to perform Works or Construction Services, Agencies must use a Register or Supplier Panel established and operated in accordance with the Instructions.
- (b) Agencies may only establish, operate and use a Register, with the prior approval of the Secretary as set out in the Instructions.

7. Contracting

Principles

Value for money, scalability and probity are procurement principles that are specifically relevant to contracting requirements.

Of particular relevance to this Direction are the following construction procurement principles:

- appropriately planning and managing Public Construction Procurement to deliver procurement objectives;
- employing the appropriate Procurement Models and processes taking account of the complexity and value of the project and supplier market capability;
- reducing unnecessary burden of Public Construction Procurement for all parties;
- encouraging appropriate innovation and responsiveness in the supplier market; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

7.1 Contracting requirements

7.1.1 Approval of Victorian Public Construction Contracts

The Secretary, or a person approved in writing by the Secretary, must:

- (a) approve forms of contract for use as Victorian Public Construction Contracts, which may be approved for use subject to any specified conditions or restrictions;
- (b) publish a list of Victorian Public Construction Contracts; and
- (c) give at least six months' notice for the withdrawal of a Victorian Public Construction Contract.

7.1.2 Use of Victorian Public Construction Contracts

- (a) When issuing a tender (including a Limited Tender) for Works or Construction Services, an Agency must include an unamended Victorian Public Construction Contract in the Tender Documentation, except:
 - (i) to the extent that amendments are required to comply with law or policy, including these Directions; or
 - (ii) as permitted in the Instructions.
- (b) Where the Instructions permit the release of a tender that includes either an amended Victorian Public Construction Contract or an alternative form of contract, Agencies must ensure that the form of contract is:
 - (i) appropriate for the Procurement Model;
 - (ii) consistent with other contracts used by the Agency to engage suppliers to perform comparable Works or Construction Services; and
 - (iii) consistent with any applicable Victorian Government policy, including any mandatory requirements or approvals required under those policies or set out in the Instructions.
- (c) In addition to paragraph (b), where the Instructions permit the release of a tender that includes an amended Victorian Public Construction Contract, Agencies must:

- (i) avoid unnecessary amendments; and
- (ii) clearly identify any amendments to allow tender participants to readily identify the differences from the approved form of contract.

7.1.3 Departures to contracts during tender negotiation

- (a) Agencies may, at their discretion, accept non-material contract departures requested by tenderers.
- (b) Agencies must obtain approval under the Instructions before accepting a material contract departure proposed by a tenderer.

7.1.4 Amendments to contracts during life of contract

- (a) Agencies may, at their discretion, agree to non-material contract amendments at any time after the contract is executed.
- (b) Agencies must obtain approval under the Instructions before agreeing to a material contract amendment after a contract is executed.

7.1.5 Departures and amendments to comply with law and policy

For the avoidance of doubt, Agencies must ensure that departures and amendments under Directions 7.1.3 and 7.1.4 comply with these Directions, the Instructions and any legal, policy or probity requirements.

7.1.6 Projects subject to the High Value High Risk Framework

For Public Construction Procurements subject to the High Value High Risk Project Assurance Framework:

- (a) an amended Victorian Public Construction Contract or an alternative form of contract permitted under that framework is permitted under these Directions;
- (b) material contract departures approved under the High Value High Risk Framework do not require separate approval under Direction 7.1.3(b); and
- (c) material contract amendments approved under the High Value High Risk Framework do not require separate approval under Direction 7.1.4(b).

7.1.7 Partnerships and alliancing

Public Construction Procurements that are subject to the Partnerships Victoria Requirements or the Victorian Alliancing Policy:

- (a) are not required to comply with this Direction 7; and
- (b) must use contracts that are consistent with those policies.

7.2 Contractual terms and conditions

7.2.1 Compliance with legislative and policy requirements

Agencies must ensure that contracts for Works or Construction Services comply with policy and legislative requirements, including the policies set out in the Instructions.

7.2.2 Non-Standard Commercial Arrangements

Agencies must not propose or enter into a Non-Standard Commercial Arrangement, in a tender process or as a contract amendment, except as permitted in the Instructions.

7.2.3 Risk allocation

Agencies must ensure that contracts for Works or Construction Services:

- (a) clearly define the roles and responsibilities of the parties to the contract;
- (b) identify responsibility for key risks associated with the Works or Construction Services;
- (c) as far as practicable, allocate risks to the party best able to manage them, and
- (d) address any mandatory requirements set out in the Instructions.

7.2.4 Subcontracting

Contracts must contain appropriate mechanisms to ensure that:

- (a) the Principal has appropriate visibility of, and rights to approve, subcontracting arrangements;
- (b) terms and conditions of subcontracts are compatible with those of the head contract and consistent with the principles of risk allocation and security of payment set out in this Direction; and
- (c) the Contractor demonstrates proof of payment to subcontractors and suppliers.

7.2.5 Dispute resolution

Agencies must ensure that contracts provide for efficient and effective resolution of disputes (including through the use of alternative dispute resolution procedures) that take into account the Procurement Model and the nature and complexity of the Works or Construction Services being performed under the contract and any related contracts.

7.2.6 Performance security

Where a supplier is required to provide performance security, the contract must allow the supplier to provide an unconditional undertaking, in a form and from a financial institution acceptable to the Agency, as an alternative to cash.

7.2.7 Security of payment

Contracts must be consistent with the requirements of the **Building and Construction Industry Security of Payment Act 2002** and provide for:

- (a) fair entitlement to payment, including identifying appropriate milestone payments; and
- (b) prompt payment, with interest payable on late payments.

8. Improving performance and continuous improvement

Principles

Value for money, probity and scalability are procurement principles that are specifically relevant to capability building, performance and continuous improvement of both the supplier market and Agency staff.

Of particular relevance to this Direction are the following construction procurement principles:

- encouraging appropriate innovation and responsiveness in the supplier market;
- treating all tender participants fairly and equally;
- fostering continuous improvement and building appropriate skills and capability in the conduct of Public Construction Procurement; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

8.1 Debrief for tender participants

- (a) At the conclusion of a process to engage a supplier to perform Works or Construction Services, Agencies must inform all tender participants of the outcome.
- (b) Agencies must offer a debrief to all tender participants and, if the offer of a debrief is accepted, ensure a debrief is provided promptly in accordance with the requirements set out in the Instructions.

8.2 Supplier performance and shared reporting regime

- (a) Agencies must establish appropriate processes to monitor supplier performance and to receive supplier feedback on the Agency's performance.
- (b) Agencies must comply with any shared reporting set out in the Instruction.

8.3 Complaints

Agencies must establish appropriate processes to respond to complaints raised by tender participants (and potential participants) about the conduct of Public Construction Procurement by the Agency.

8.4 Public Construction Procurement Committee

- (a) The Secretary may establish a committee to provide advice to the Minister and the Secretary in relation to these Directions and the Instructions.
- (b) The committee's terms of reference should include:
 - (i) supporting implementation of these Directions by Agencies;

- (ii) ensuring the requirements in these Directions and the Instructions remain relevant and responsive to the commercial and regulatory environment applicable to Public Construction Procurement;
 - (iii) advising on the circumstances when Limited Tendering is permitted;
 - (iv) advising on the contracting principles and consistent application and standardisation in contracting; and
 - (v) ensuring that information relevant to Public Construction Procurement is disseminated throughout the Victorian Government.
- (c) The committee should be appropriately representative of the Agencies and classes of Agencies that must comply with these Directions.

9. Standards

Principles

Of particular relevance to this Direction is the following construction procurement principle:

- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

9.1 Standards for public construction

- (a) From time to time the Secretary may set Standards relating to Construction Services or Works.
- (b) Where relevant, Agencies must ensure compliance with any Standard set out in the Instruction.

10. Accountability

Principles

The nature of this Direction 10 is such that all of the procurement principles are relevant. However, of particular relevance are the procurement principles of accountability and scalability.

Recognising that all of the construction procurement principles are relevant to achieving accountability, of particular relevance to this Direction are the following construction procurement principles:

- conducting Public Construction Procurement in an open and transparent manner ensuring defensibility of processes;
- fostering continuous improvement and building appropriate skills and capability in the conduct of Public Construction Procurement; and
- undertaking Public Construction Procurement in accordance with the relevant legislation, policy, guidance and any mandatory requirements in these Directions.

10.1 Responsibilities of the Accountable Officer

The Accountable Officer of each Agency must, with respect to their Agency:

- (a) ensure the Agency is appropriately resourced with staff qualified and skilled to undertake Public Construction Procurement;
- (b) establish appropriate and effective governance frameworks to ensure compliance with these Directions and Instructions including appropriate record management systems;
- (c) ensure appropriate responsibility, authority and accountability for Public Construction Procurement is defined and allocated within the Accountable Officer's operating frameworks, including documenting:
 - (i) who is responsible for monitoring compliance with these Directions and Instructions;
 - (ii) ensuring systems and processes to support compliance with these Directions and Instructions are in place; and
 - (iii) who is responsible and accountable for decision-making and any approvals required under these Directions and Instructions; and
- (d) ensure that exemptions from these Directions and Instructions are sought and implemented appropriately.

10.2 Delegation

The Accountable Officer may delegate, in writing, powers and responsibilities under these Directions and the Instructions, other than this power of delegation and the certification of Special Circumstances under Instruction 3.2.2(j), in which case:

- (a) the Accountable Officer must:
 - (i) retain accountability for the requirement;
 - (ii) oversee the relevant actions of their delegates;

- (iii) ensure that the delegation is appropriate for the efficient and effective conduct of the business of the Agency;
 - (iv) ensure that the delegation is assigned to a position and that position is appropriate in relation to the powers and responsibility being delegated;
 - (v) keep a record of the delegation;
 - (vi) ensure that the delegation is regularly reviewed and updated as required to ensure it is kept current; and
- (b) the delegate must:
- (i) be an executive employed by the Agency;
 - (ii) be appropriately qualified or experienced to perform the delegated functions;
 - (iii) use the delegation for the purpose intended; and
 - (iv) act within the limits of the delegation.

11. Authorising provisions

11.1 Authority

11.1.1 Issuing of these Directions

These Directions are issued by the Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**, under section 30 of that Act.

11.1.2 Effectiveness

These Directions are effective from 1 July 2018. They supersede the following directions issued under the **Project Development and Construction Management Act 1994 (Vic)**, which are repealed and replaced from 1 July 2018:

- (a) Ministerial Direction No 1 – Tendering provisions for public construction, version 4, effective 1 December 2016 (and the associated Guide to Ministerial Direction No 1 – Tendering provisions for public construction, issued by the Secretary);
- (b) Ministerial Direction No 2 – Contractual provisions for public construction, version 2, effective 1 December 2016 (and the associated Guide to Ministerial Direction No 2 – Contractual provisions for public construction, issued by the Secretary); and
- (c) Ministerial Direction No 4 – Construction requirements for a community fire refuge, issue 2, effective 1 October 2015.

11.1.3 Issuance of the Instructions

- (a) The Secretary has issued Instructions setting out further requirements relating to matters addressed in these Directions.
- (b) Pursuant to section 32(e) of the **Project Development and Construction Management Act 1994 (Vic)**, these Directions wholly incorporate the Instructions.
- (c) To avoid doubt, in order to comply with these Directions, Agencies must also comply with the Instructions.

11.1.4 Issuance of the Guidance

The Department of Treasury and Finance may issue non-mandatory guidance from time to time to promote consistent understanding of the requirements of these Directions and the Instructions.

11.1.5 Issuance of Standards

- (a) The Secretary may issue Standards from time to time.
- (b) To avoid doubt, in order to comply with the Directions, Agencies must also comply with the Standards (where relevant).

11.1.6 Discretionary authority, duties and approvals

Pursuant to sections 32(c) and (d) of the **Project Development and Construction Management Act 1994 (Vic)**:

- (a) the Secretary or a person authorised in writing by the Secretary:
 - (i) may exercise a discretionary authority under these Directions where a discretion is provided for expressly or by necessary implication;
 - (ii) must perform a duty under these Directions where a duty is imposed expressly or by necessary implication;
 - (iii) may grant approval under these Directions where a matter is subject to approval expressly or by necessary implication; and
- (b) the Secretary or a person authorised in writing by the Secretary may exercise a discretionary authority or grant an approval under the Instructions as appropriate and as consistent with these Directions.

11.2 Order of precedence

To the extent that the requirements of any of these Directions is inconsistent with:

- (a) any International Agreement, or another Act or statutory rule relating to public construction, including the **Public Administration Act 2004 (Vic)**, the **Financial Management Act 1994 (Vic)**, or the **Financial Management Act Standing Directions 2016**, the requirements of these Directions must, where possible, be interpreted to resolve such inconsistency. If it is not possible to resolve the inconsistency, then such International Agreement, or other Act or statutory rule shall prevail;
- (b) a Victorian Government Purchasing Board Supply Policy, these Directions shall prevail to the extent of any inconsistency;
- (c) the Victorian Alliancing Policy, such policy shall prevail over these Directions to the extent of any inconsistency, provided that the Agency complies with the Victorian Alliancing Policy, including obtaining all necessary approvals; and
- (d) the Partnerships Victoria Requirements, such policy shall prevail over these Directions to the extent of any inconsistency, provided that the Agency complies with the Partnerships Victoria Requirements, including obtaining all necessary approvals.

12. Definitions and interpretation

12.1 Definitions

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

12.2 Interpretation

- (a) References to an Act, subordinate legislation, or government policy means such Act, subordinate legislation or government policy as amended or replaced from time to time.
- (b) A reference to compliance with these Directions includes compliance with any Instructions issued by the Secretary.
- (c) A reference to a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority.
- (d) For the avoidance of doubt, references to 'Works or Construction Services' includes procurement or contracts for both Works and Construction Services.

Attachment: Definitions

Accountable Officer has the meaning given to it in the Financial Management Act Standing Directions 2016.

Agency means a department or public body, in each case as defined in the **Project Development and Construction Management Act 1994 (Vic)**.

Construction Services means 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, commercial advisory services.

Contractor means a person bound to perform Works or Construction Services under an agreement that results from a Public Construction Procurement that is subject to these Directions.

Department means the department supporting the Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**.

Directions means these directions for public construction issued by the Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**, and 'Direction' means each direction herein.

Excluded Entity means an entity for which these Directions are not mandatory, as set out in Direction 1.3.

Financial Reporting Direction 12B means **Financial Reporting Direction 12B (Disclosure of major contracts)** issued under the **Financial Management Act 1994 (Vic)** (June 2016).

Financial Management Act Standing Directions 2016 means the **Standing Directions of the Minister for Finance 2016 issued under the Financial Management Act 1994 (Vic)** and the associated Instructions and Guidance.

International Agreement means any international agreement entered into by the State or the Commonwealth that applies to procurement undertaken by an Agency.

Guidance means the guidance issued by the Secretary pursuant to these Directions.

Instructions means the instructions as issued or amended by the Secretary from time to time, and 'Instruction' means each instruction therein.

Limited Tender means the engagement of a supplier to perform Works or Construction Services in accordance with Direction 3.2(c) conducted:

- without competition – that is by inviting a single tender participant (whether or not from a Register); or
- with limited competition – that is by inviting two or more tender participants (whether or not from a Register).

Minister means the Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**.

Non-Standard Commercial Arrangement means a term or condition in a contract or deed, including the contents of binding schedules or annexures, that:

- in any way contravenes these 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.

Portfolio Agency has the meaning given to it in the Financial Management Act Standing Directions 2016.

Portfolio Department has the meaning given to it in the Financial Management Act Standing Directions 2016.

Principal means a person (being an Agency on behalf of the Crown in right of the State of Victoria, an Agency in its own right, as applicable, or a validly appointed agent of an Agency) entitled to the benefit of an agreement for Works or Construction Services that results from a Public Construction Procurement that is subject to these Directions.

Procurement Model means the procurement model used to deliver the Works or Construction Services, including, for example, consultancy, construction-management, design and construct, construct-only, public private partnership, alliancing, managing contractor and early contractor involvement.

Public Construction Procurement means activities related to the engaging of suppliers to perform Works or Construction Services, including:

- tender processes to engage a supplier to perform Works or Construction Services;
- the terms of engagement and contracts used to engage suppliers to perform Works or Construction Services; and
- management of engagements for suppliers to perform Works or Construction Services and reporting on performance of suppliers engaged to deliver Works or Construction Services.

Public Sector Values has the meaning given to it in section 7 of the **Public Administration Act 2004** (Vic).

Register means a register of pre-qualified suppliers established in accordance with these Directions.

Responsible Minister means:

- in relation to a Department (other than an Independent Office), the Minister or Ministers for the time being responsible for any part of that Department;
- in relation to all other Agencies, the Minister or Ministers for the time being administering the legislation or instrument under which the Agency is established or as otherwise declared by way of that establishing legislation or instrument.

Secretary means the Secretary of the Department, anyone who occupies that office temporarily, or any officer of the Department who becomes responsible for the functions of that office from time to time.

Selective Tender means a competitive tender open only to suppliers on a Register.

Special Circumstances means the special circumstances set out in Instruction 3.2.2 when a Limited Tender may be used.

Standard means a Standard set pursuant section 29 of the **Project Development and Construction Management Act 1994** (Vic).

Supplier Panel means a standing offer arrangement for a group of suppliers engaged under contract to provide services in a defined future period.

Tender Documentation means the documentation released to the market as part of a tender process, for example the request for tender and supporting documents. If a multi-stage

tender process is adopted, then Tender Documentation refers to the documentation released at each stage, for example the request for expression of interest.

Tender Notice means the notice announcing the beginning of a formal tender process, which occurs:

- in a single stage tender process: a request for proposal, request for tender, notice of invitation to supply, or notice of approach to market; and
- in a two stage tender process: the request for information or request for expression of interest.

Victorian Government Purchasing Board means the Victorian Government Purchasing Board established by section 54A of the **Financial Management Act 1994 (Vic)**.

Victorian Government Purchasing Board in-scope entities means Agencies that must apply the supply policies issued by the Victorian Government Purchasing Board

Victorian Government Purchasing Board supply policies means the supply policies issued by the Victorian Government Purchasing Board pursuant to Part 7A of the **Financial Management Act 1994 (Vic)**.

Victorian Public Construction Contract means a contract approved under Direction 7.1.

Victorian Public Sector codes of conduct means the following codes of conduct issued from time to time by the Victorian Public Sector Commission under the **Public Administration Act 2004**, being as at the date of this Direction:

- the Code of Conduct for Victorian Public Sector Employees;
- the Code of Conduct for Victorian Public Sector Employees Employed by Special Bodies; and
- the Code of Conduct for Directors of Victorian Public Entities.

Works means works for construction, maintenance, rehabilitation, alteration, extension or demolition of any improvements on land.



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