Fact sheet - Comparison of former and current Ministerial Directions for Public Construction

**Effective date 1 July 2018**

On 1 July 2018 the [**Ministerial Directions for Public Construction Procurement in Victoria**](https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement) (2018 Directions) replaced Ministerial Directions No 1, 2 and 4 for Public Construction Procurement (2016 Directions). This fact sheet identifies where the 2016 Directions have been incorporated into the 2018 Directions, and gives a summary of what has changed.

This fact sheet does not comprehensively describe the 2018 Directions and should not be used as a substitute for reviewing them.

Abbreviations used in this fact sheet:

2016 Directions:

* MD[number] refers to Ministerial Directions No 1, 2 or 4 for Public Construction Procurement, as noted by the number.
* GMD[number] refers to the Guide to Ministerial Directions No 1, 2 or 4 for Public Construction Procurement, as noted by the number.

2018 Directions:

* Dir refers to the **Ministerial Directions for Public Construction Procurement in Victoria**.
* Inst refers to the **Instructions for Public Construction Procurement in Victoria**.

**Help and support**

If you have any queries, please do not hesitate to contact the Construction Policy Team on 03 7005 9533 or by email: construction.procurement@dtf.vic.gov.au.

| **Subject** | **Directions** | **What has changed** |
| --- | --- | --- |
| **2016** | **2018** |
| Format generally | Ministerial Direction and related Guide | Ministerial Directions, Instruction and Guidance | Replaces the mandatory 2016 Ministerial Directions and their related mandatory Guides with:* Ministerial Directions – contains mandatory requirements.
* Instructions – contains mandatory requirements.
* Guidance – non mandatory guidance that supports the Directions and Instructions.

The Ministerial Directions and Instructions should be read and interpreted together, in a similar manner to the operation of the 2016 Ministerial Directions and their related Guides. |
| Authority | MD1 cl 1.1GMD1 cl 1.1MD2 cl 1.1GMD2 cl 1.1 | Dir 11.1.1Dir 11.1.3Dir 11.1.4 | No change. |
| Effectiveness | MD1 cl 1.2GMD1 cl 1.2MD2 cl 1.2GMD2 cl 1.2 | Dir 11.1.2Dir 11.1.6 | Effective date for the 2018 Directions and Instruction is 1 July 2018.Transitional provisions are included for certain revised requirements – refer to the [Fact sheet - Transition provisions for the introduction of the revised Ministerial Directions for Public Construction](https://www.dtf.vic.gov.au/practitioners-toolkit-fact-sheets-public-construction-procurement). |
| Purpose | GMD1 cl 2.1 | Dir 1.1 | Retains the general principles to support the economical and efficient use of State resources in procurement and extends this as a purpose statement.The purpose of the 2018 Directions is to support efficient, economical, and effective delivery of the Public Construction Procurement consistent with the principles set out in Direction 1.2. |
| Principles | GMD1 cl 2.1 | Dir 1.2 | Retains and extends the general principles to support the economical and efficient use of State resources in procurement.The 2018 Directions are principles based. When undertaking Public Construction Procurement Agencies must act in a manner consistent with the following principles (noted here in summary form):* value for money;
* accountability;
* probity; and
* scalability.

More specific Construction Procurement Principles are described. The Construction Procurement Principles highlight the purpose behind a Direction.The principles inform the 2018 Directions but are not independent substantive obligations. |
| Application | MD1 cl 1.3GMD1 cl 1.3MD2 cl 1.3GMD2 cl 1.3 | Dir 1.3 | Clarifies that the 2018 Directions apply to:* Public Construction Procurement undertaken by or on behalf of an Agency; and
* describe which Agencies are covered by the Directions – those Agencies that are subject to the Standing Directions of the Minister for Finance 2016 (refer to the fact sheet [Is your Agency subject to the Standing Directions of the Minister for Finance?](http://www.dtf.vic.gov.au/Publications/Government-Financial-Management-publications/Standing-Directions-of-the-Minister-for-Finance-2016/Standing-Directions-2016-publications)).

The number of Agencies directly covered by the 2018 Directions is smaller than applied under the 2016 Directions, which covered all Agencies. Certain Agencies (school councils, class B cemetery trusts, incorporated committees of management, VicSES registered units and CFA volunteer brigades) are excluded from the 2018 Directions, but are subject to appropriate construction procurement requirements established by their Portfolio Department.Portfolio Departments must provide advice and support to Portfolio Agencies in relation to complying with the 2018 Directions.Portfolio Departments must support the Responsible Minister in the oversight of Portfolio Agencies. This is a substantive requirement under the **Public Administration Act 2004 (Vic)** repeated in 2018 Direction 1.3.2 for clarity.Clarifies the scope of application of Public Construction Procurement includes:* 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.
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| Order of precedence | MD1 cl 1.4MD1 cl 2.3MD2 cl 1.4 | Dir 11.2 | Retains the precedence that the 2018 Directions prevail over a Victorian Government Purchasing Board Supply Policy to the extent of any inconsistency.Clarifies that where any provision of the 2018 Directions is inconsistent with any International Agreement or any other 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 the 2018 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.Retains the precedence that to the extent a requirement of the 2018 Directions is inconsistent with 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.Clarifies that to the extent a requirement of the 2018 Directions is inconsistent with the **Partnerships Victoria Requirements**, such policy shall prevail over the 2018 Directions to the extent of any inconsistency, provided that the Agency complies with the Partnerships Victoria Requirements for public private partnerships, including obtaining all necessary approvals. |
| Definitions | MD1 cl 1.5GMD1 cl 1.5MD2 cl 1.5GMD2 cl 1.5 | Dir 12 | Contractor is replaced by the general description supplier of Works.Consultant is replaced with the general description supplier of Construction Services.The definition of Construction Services is narrower than the former definition of Consultant. Construction Services means services directly related to the delivery of the Works, including architectural and design services. It does not include services indirectly related to the delivery of the Works, including legal services or commercial advisory services.Clarifies the definition of a Limited Tender means the engagement of a supplier to perform Works or Construction Services in accordance with Direction 3.2(c) which may be 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).

Clarifies the definition of Selective Tender means a competitive tender open only to suppliers on a Register.Clarifies that a reference to Works or Construction Services includes procurement or contracts for both Works and Construction Services. |
| Exemptions |  | Dir 1.4Inst 1.4 | New provision that allows Agencies to apply for exemptions. An exemption may:* apply to an Agency or class of Agencies;
* apply to specific or all requirements in the Directions and Instructions;
* be granted on an ongoing basis, or for a specific period of time;
* be granted in respect of a project or class of projects; or
* be made with or without conditions.

Instruction 1.4 requires exemptions to be submitted in a specified format and address specified matters.An exemption to the Directions, or to the Directions and Instructions, is determined by the Minister responsible for Part 4 of the **Project Development and Construction Management Act 1994 (Vic)**.An exemption to the Instructions alone may be determined by the Secretary of the Department of Treasury and Finance. |
| International Agreements | MD1 cl 2.3 | Dir 2Inst 2.1Inst 2.2 | Retains the requirement for covered procurements to apply the requirements of International Agreements.Clarifies which Agencies are subject to International Agreements and which procurements are covered (Instruction 2.1 Attachment 1).Clarifies the relevant obligations under International Agreements (Instruction 2.1 Attachment 2).Makes explicit that the longstanding Australia New Zealand Government Procurement Agreement is an international agreement covering construction procurement. Clarifies which Agencies are subject to this Agreement and the relevant obligations of this Agreement (Instruction 2.2). |
| Tender preparation and planning |  | Dir 3.1Inst 3.1 | Makes explicit the best practice requirement for tender planning and preparation.Clarifies that the amount of tender 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:* clear procurement objectives;
* market analysis, market sounding and engagement strategy;
* tender strategy;
* key dates and time periods during the tender process;
* management of probity;
* contract management; and
* governance and resourcing.
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| Competition and contestability | MD1 cl 2GMD1 cl 2.6.3GMD1 cl 2.2.2 | Dir 3.2Inst 3.2 | Retains the use of thresholds to promote competition and contestability.Higher procurement thresholds for public construction have been established, reflecting current market conditions.Thresholds for Works (all values inclusive of GST):* One written tender consistent with market prices new threshold $50,000, formerly $25,000.
* At least three written tenders sought new threshold $500,000, formerly $200,000.
* Selection from prequalified contractors or open tenders new threshold above $500,000, formerly $200,000.

Thresholds for Construction Services (all values inclusive of GST):* One written tender consistent with market prices new threshold $50,000, formerly $25,000.
* At least three written tenders sought new threshold $200,000, formerly $150,000.
* Selection from prequalified contractors or open tenders new threshold above $200,000, formerly $150,000.

Retains the Special Circumstances that may justify use of a Limited Tender. The Special Circumstances listed differ slightly from the old list of Circumstances, as they have been aligned with the grounds for Limited Tendering under International Agreements. Clarifies the use of Special Circumstances, such as listing reasons when the Special Circumstance of urgency may be considered.Clarifies that procurement conducted in accordance with the Market-Led Proposals Guideline is a Special Circumstance when considering alternative forms of tendering.Guidance on the size of tender fields is retained in Competition and contestability (Guidance 3.2.1). |
| Promoting efficiency in the tender process | GMD1 cl 2.2GMD1 cl 2.3.2GMD1 cl 2.3.6CMD1 cl 2.3.7 | Dir 3.3Inst 3.3 | Retains requirements promoting efficiency in the tender process. |
| Tender Notices |  | Dir 3.4Inst 3.4 | Extends the requirement to provide tender participants with effective notice of the tender process – Tender Notices now must be used for open tenders (ongoing requirement) and for a Selective Tender or Limited Tender – each potential tender participant invited to participate in the tender process (new requirement).Makes explicit the long standing requirement to publish Tender Notices on a website or system nominated by the Secretary of the Department of Treasury and Finance, currently Tenders VIC. Other means of publication may also be used, in addition to the nominated website or system.If Tender Documentation is not included in the Tender Notice, then the Tender Notice must provide details about how to obtain access to the Tender Documentation.To avoid doubt, the requirement to use the nominated website or system refers to the publication of the Tender Notice only. The Ministerial Directions do not set any requirement for the location or method for submitting tenders. |
| Tender open times | GMD1 cl 2.3.3 | Dir 3.5 | Retains the requirement to provide a reasonable time for tendering. |
| Tender Documentation | GMD1 cl 2.3.1GMD1 cl 2.3.2GMD1 cl 2.3.4 | Dir 3.6Inst 3.6 | Retains the requirement that the Tender Documentation should clearly set out the terms and conditions applicable to the tender process.Retains the requirement to avoid making changes to the Tender Documentation and to consider the need to extend the tender period when changes arise close to the tender closing time. |
| Evaluation criteria | GMD1 cl 2.3.5GMD1 cl 4.3GMD1 App AGMD1 App B | Dir 3.7Inst 3.7Inst 2.1 | Retains the requirement to disclose the evaluation criteria.Retains mandatory evaluation criteria for value for money, occupational health and safety management and industrial relations management.Raises the thresholds when the mandatory evaluation criteria for occupational health and safety management and industrial relations management apply:Works (all values inclusive of GST)* Occupational health and safety management new threshold $500,000, formerly $200,000.
* Industrial relations management new threshold $200,000, formerly $150,000.

Construction Services (all values inclusive of GST)* Occupation health and safety management new threshold $200,000, formerly $150,000.

Retains approved assurance systems that may be cited as evidence of complying with the mandatory evaluation criteria.Guidance on recommended evaluation criteria is retained in Evaluation criteria (Guidance 3.7).Clarifies that Agencies may, but are not required to, provide tender participants with guidance about the evaluation criteria and indication of the relative importance or weighting of the evaluation criteria, unless the procurement is a covered procurement under an International Agreement. |
| Probity requirements | GMD1 cl 2.4 | Dir 4.1Inst 4.1Dir 4.2Inst 4.2 | Retains the requirements to:* conduct procurement in a manner that meets public sector probity requirements;
* treat tender participants fairly and equally; and
* maintain confidentiality of tender participant’s commercially sensitive information and intellectual property.

Clarifies the requirement that tender processes, negotiations, evaluation processes and contract management processes are auditable, transparent and accountable.Clarifies the requirement to proactively identify and manage conflicts of interest.Retains the requirement to obtain commitments from tender participants that they have acted fairly and honestly.Makes explicit the long standing requirement to prepare a probity plan where the Works or Construction Services are likely to exceed $10 million (inclusive of GST) or is complex or otherwise high risk, applies to construction procurement. |
| Forward notices |  | Dir 5.1Inst 5.1 | New requirement to publish a forward notice, in advance of a Tender Notice, to promote competition and to allow potential tender participants to plan for and allocate resources to participate in the tender processes.The format and content of forward notices are described in Forward notice (Instruction 5.1).Forward notices must be placed on the website or system nominated by the Secretary of the Department of Treasury and Finance, currently Tenders VIC. Other means of publication may also be used, in addition to Tenders VIC.To avoid doubt, the requirement to use the nominated website of system refers to the publication of the forward notice only. The Ministerial Directions do not set any requirement for the location or method for submitting tenders. |
| Publishing details of procurements undertaken |  | Dir 5.2Inst 5.2 | Makes explicit the long standing requirement to disclose key details of procurement undertaken applies to construction contracts for Works or Construction Services.Makes explicit the long standing requirement of **Financial Reporting Direction 12B** (disclosure of the full text of contracts; applies to Departments only) applies to construction contracts for Works or Construction Services.Makes explicit the long standing requirement that disclosure of procurement undertaken must be made on the website or system nominated by the Secretary of the Department of Treasury and Finance, currently Tenders VIC.Establishes the types of contracts subject to disclosure:* agreements for procurements of Works or Construction Services;
* head agreements, such as standing offer arrangements or panels;
* agreements entered into under head agreements (requirement specific to construction procurement; note this requirement differs from the Victorian Government Purchasing Board policy);
* agreements entered into with suppliers from a register; and
* agreements to vary any of the forgoing.

Establishes guidelines for disclosing certain documents comprising part of a contract, how to disclose variations to contracts, and presentation of contract documents subject to redaction (Instruction 5.1 Attachment 1). |
| Use of Registers and Panels | GMD1 cl 3GMD1 cl 3.4 | Dir 6.1Inst 6.1 | Retains the requirement for approval by the Secretary of the Department of Treasury and Finance for Registers of prequalified suppliers. Registers may be open for use by whole of government, or may be specific to an Agency. Retains the conditions for accreditation of Registers.Retains the requirement that panels of suppliers be established through a suitable procurement process. |
| Contracting requirements | MD2 cl 2.1 | Dir 7.1Inst 7.1 | Retains the use of mandatory standard forms of construction contract, referred to collectively as the Victorian Public Construction Contracts.Retains the requirement to use appropriate forms and consistent forms of contract to promote efficiency.Retains the requirement that where amendments are made to a contract known to the market, amendments to the contract are to be clearly identified and kept to a minimum.While use of one of the Victorian Public Construction Contracts is the expectation, the requirements of a project may require amendments to a standard contract before release to market, during tender negotiations, or during the life of the contract. New processes have been established for the approval of such amendments.An Agency may issue an amended Victorian Public Construction Contract or an alternative form of contract if one or more of the following circumstances apply:* Victorian Public Construction Contracts are inappropriate for the type of works being procured;
* Victorian Public Construction Contracts do not sufficiently address interface issues where there are multiple contractors working on a site or where the works are undertaken on an operational site; or
* the Works or Construction Services relate to leased premises or third party property where the form of contract is required to be approved by the lessor or such third party.

The concept of a material contract departure is introduced. A material contract departure is one that, taking into account the value, complexity and risk of the Works or Construction Services, could substantially impact the manner in which public construction procurement is undertaken by other Agencies.During tender negotiations, a material contract departure must only be accepted following approval by the Secretary of the Department of Treasury and Finance or a person authorised in writing by the Secretary of the Department of Treasury and Finance.During the life of the contract, a material contract amendment must only be agreed to following approval by the Secretary of the Department of Treasury and Finance or a person authorised in writing by the Secretary of the Department of Treasury and Finance. |
| Contractual terms and conditions | MD2 cl 2.2 | Dir 7.2Inst 7.2 | Retains requirement that contractual terms and conditions must address certain provisions.Makes explicit the longstanding requirement to ensure that government policy and legislative requirements are addressed in contracts. Presents a list of government policy and legislative requirements that must be addressed in construction contracts.The concept of non-standard commercial arrangements is introduced. A non-standard commercial arrangements is defined as 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.Non-Standard Commercial Arrangements must only be proposed or agreed to following approval by the Secretary of the Department of Treasury and Finance or a person authorised in writing by the Secretary of the Department of Treasury and Finance.The most commonly used contracts in the suite of Victorian Public Construction Contracts have been updated to reflect government policy and legislative requirements.Refreshed special conditions for AS2124-1994 (version June 2018) and AS4300-1995 (version June 2018) have been published.A refreshed version of the minor works contract (version June 2018) has been published.A new VPS consultancy agreements (long and short forms) (version June 2018) have been published.A refreshed VPS model conditions of tender (version June 2018) has been published.These contracts are supported by practical guidance to promote a common approach to understanding issues that arise in construction contracts. Recognising that the circumstances of each project may differ, the guidance highlights relevant considerations to enable practitioners to better understand and interpret the standard documentation. |
| Debrief for tender participants | GMD1 cl 2.5 | Dir 8.1Inst 8.1 | Retains the requirement to inform tender participants of the outcome of the procurement.Retains the requirement to offer a debrief to tender participants, conducted by an appropriately senior officer |
| Shared reporting regime | GMD1 cl 5.1 | Dir 8.2Inst 8.2 | Retains the requirement to assess how suppliers performed.Makes explicit that the requirement for shared reporting applies to new procurement started after 1 July 2018.Makes explicit the requirement to assess how suppliers performed applies to all contracts for Works or Construction Services 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.

Establishes:* the format to be used when assessing suppliers;
* when to assess how suppliers perform – generally at six monthly intervals, within 30 days of the date for practical completion, and within 30 days of the end of the defects liability period.
* the requirement to submit performance reports to a website or system nominated by the Secretary of the Department of Treasury and Finance.
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| Complaints |  | Dir 8.3Inst 8.3 | Makes explicit the long standing requirement that Agencies must establish appropriate processes to respond to complaints raised by tender participants (and potential tender participants). |
| Public Construction Procurement Committee | GMD2 cl 5 | Dir 8.4Inst 8.4 | Retains use of an advisory committee. Formerly called the Construction Contracts Advisory Panel, now called the Public Construction Procurement Committee.Focus of the advisory committee will be to support implementation of the Directions and to ensure that the Directions remain relevant and responsive to the commercial and regulatory environment. |
| Standards | MD4 | Dir 9Inst 9.1Dir 11.1.5 | Retains power under the **Project Development and Construction Management Act 1994 (Vic)** for the publication of standards. Provides the power to the Secretary of the Department of Treasury and Finance to issue Standards.2016 Ministerial Direction No. 4 - Construction requirements for a community fire refuge has been repealed and is replaced without amendment by 2018 Instruction 9.1.1 Standard for constructing a community fire refuge. |
| Responsibilities of the Accountable Officer |  | Dir 10.1Inst 10.1 | Makes explicit the long standing requirement that the Accountable Officer is responsible 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 and Instructions including appropriate records management systems;
* ensure appropriate responsibility, authority and accountability for construction procurement; and
* ensure that exemptions from the Directions and Instructions are sought and implemented appropriately.

Establishes that the Directions and Instructions are enforced by the **Financial Management Act Standing Directions of the Minister for Finance 2016.** The Standing Directions 2016 set out a number of relevant matters including:* Standing Direction 4.2.4 – requires the Agency to apply the Directions and Instructions (requirement also exists from the **Project Development and Construction Management Act 1994 (Vic)**).
* Standing Direction 4.2.1 – acquisition of assets, goods and services – procuring goods and services, including commissioning and establishing performance and financial standards and processes.
* Standing Direction 5 - the requirement to demonstrate compliance with the Directions and Instructions. 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.
* Standing Direction 5.1.4(c) – the Agency’s audit committee, or alternate review mechanism where there is not audit committee, must review the attestation.
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| Delegation | MD1 cl 4 | Dir 10.2 | Retains the ability of the Accountable Officer to delegate in writing a power or responsibility under the Directions and Instructions.Clarifies that the Accountable Officer cannot delegate this power of delegation and the certification of Special Circumstance under Instruction 3.2.2(j). |