

Construction Alert

A new direction for Victorian government public construction

6 February 2019

Introduction

With effect from 1 July 2018, when procuring public construction works and services, Victorian government departments and public bodies must adhere to mandatory:

- (a) Ministerial Directions for Public Construction Procurement in Victoria (**Directions**); and
- (b) Instructions for Public Construction Procurement in Victoria (**Instructions**),

issued under Part 4 of the *Project Development and Construction Management Act 1994* (Vic) (**PDCMA**) which should be read and interpreted together. The Directions and Instructions are supported by non-mandatory Guidance for Public Construction Procurement in Victoria (**Guidance**) also issued under Part 4 of the PDCMA. The Directions, Instructions and Guidance are extensive documents and the analysis in this paper is not intended to be comprehensive. The purpose of this paper is to summarise some of the more important aspects of the Directions and Instructions which may be of interest to participants in the construction industry who contract with Victorian government departments and public bodies.

The Directions and Instructions replaced the previous Ministerial Directions Nos. 1, 2 and 4 for Public Construction Procurement (**2016 Directions**) and introduce broad ranging changes which will impact all participants involved in the procurement of public construction works and services over the life cycle of public projects. Like the 2016 Directions, the purpose of the Directions and Instructions is to support the economical and efficient use of State resources in procurement consistent with principles of value for money; accountability; probity; and scalability.

To which government departments and public bodies do the Directions and Instructions apply?

The Directions and Instructions apply to Public Construction Procurement undertaken by or on behalf of Agencies except for Excluded Entities¹.

An Agency is defined as a department or public body as defined in the PDCMA. The PDCMA defines 'department' to have the meaning given to that term in the *Public Administration Act 2004* (Vic) and 'public body' to include a public statutory authority and a State business corporation or State body within the meaning of the *State Owned Enterprises Act 1992* (Vic).

The term public statutory authority is not defined but is assumed to mean an authority which performs one or more functions of a public nature for the benefit of the community; and does so under authority granted by or under Victorian legislation to perform a public purpose; and is accountable to, and subject to control by, the State of Victoria in the performance of those functions².

It is beyond the scope of this paper to undertake a detailed analysis of which government departments and public bodies constitute Agencies. For present purposes it should be noted that the entities which must comply with the Directions and Instructions are those Agencies which fall within the ambit of the Standing Directions of the Minister for Finance 2016. For further guidance in relation to this issue, see the factsheet [Is your Agency subject to the Standing Directions of the Minister for Finance?](#) which contains a non-exhaustive list of Agencies considered by the Department of Treasury and Finance to be subject to the Standing Directions of the Minister for Finance 2016.

Excluded Entities which are not required to comply with the Directions and Instructions are currently school councils; incorporated committees of management; class B cemetery trusts; registered units under the *Victoria State Emergency Service Act 2005* (Vic); and volunteer brigades under the *Country Fire Authority Act 1958* (Vic).

It should also be noted that Agencies may apply for exemptions from specific or all the requirements of the Directions and Instructions. The Guidance note, however, that while having an exemption process is necessary, few exemptions will be warranted.

¹ Ministerial Direction 1.3

² See Factsheet published by the Dept of Treasury and Finance "Is your agency subject to the Standing Directions of the Minister for Finance" Updated May 2017

What activities amount to Public Construction Procurement

The term “Public Construction Procurement” is defined to mean:

... 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.

The two critical definitions found within the meaning of “Public Construction Procurement” are:

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

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.

In order to determine if work or services fall within these definitions, Guidance 1.3b provides examples of matters which:

(a) are clearly included as public construction, such as:

- professional services, including architectural services; engineering design; surveying; construction and project management;
- preparatory works, including excavation and grading; demolition; drainage; earthworks; foundations; foundations; fencing; geotechnical investigations; site clearing; and scaffolding;
- works, including bricklaying; erecting frames and walls; concreting; carpentry; flooring; tiling; plumbing; and roofing/guttering;
- installation of fittings, including electrical wiring; heating; ventilation; power supply; drainage; and fire protection; and
- civil works, including roads; bridges; sewers; pipelines; railways; industrial plant; bores; dredging; and retaining walls;

(b) may potentially be included as public construction, such as:

- maintenance, where the focus is on the physical structure and fixtures, including structural repairs; lifecycle items; and repairs that extend the life of the structure;
- installation of information communication and technology where the focus is on the maintenance of, or upgrades to, the built components which is to be contrasted with the scenario where the focus is on the operation of the system;
- interior design and fit out, such as painting where it is undertaken as part of a broader package of works;

(c) are not included as public construction, such as:

- goods with no installation;
- services that do not impact the physical structure;
- State Purchase Contracts, which are standing offer agreements for the supply of common use goods and services to the Victorian government; and
- cleaning (other than site cleaning as part of the completion of a building project).

Tendering requirements

When engaging a supplier to perform construction works or services the Directions and Instructions require that Agencies use one of three processes.

First, an Open Tender which is open to all potential participants via a public notice or advertisement. Any tender participant that considers that they meet the evaluation criteria may submit a response and participate in the tender.

Second, a Selective Tender open to all suppliers in the relevant category of a register of pre-qualified suppliers (**Register**) or at least three suppliers in the relevant category of the Register (**Selective Tender**). Registers are approved by the Secretary to the Department of Treasury and Finance (**Secretary**) who must advise whether the Register is approved for whole of government or for Agency specific use. They are required to be an open system that allows applications to be made at any time and also to be advertised at least once each year or employ continuous advertisement such as on a website. The Secretary is also entitled to determine certain categories or classifications of suppliers of works or services to be maintained and to nominate appropriate Registers.

Agencies are entitled to choose which type of Selective Tender is the most appropriate for their procurement balancing such things as the number of tender participants qualified in the relevant category and market interest in the procurement.

Third, a Limited Tender conducted without competition or with limited competition. A Limited Tender means the engagement of a supplier to perform works or construction services without competition by inviting a single tender participant whether from a Register or with limited competition by inviting two or more tender participants whether or not from a Register. This form of tendering is most appropriate where competition is restricted or absent and may be used by an Agency where:

- (a) the value of the engagement is expected to be less than \$50,000 (inclusive of GST), in which case the Agency may invite a single potential tender participant to take part in the Limited Tender;
- (b) the value of the engagement, in the case of construction works, is expected to be more than \$50,000 (inclusive of GST) but less than \$500,000 (inclusive of GST) or in the case of construction services, more than \$50,000 (inclusive of GST) but less than \$200,000 (inclusive of GST) in which case the Agency must invite at least three potential tender participants to take part in the Limited Tender;
- (c) special circumstances exist:
 - (i) where extreme urgency has occurred due to unforeseeable events or because the works or services could not be obtained in time by an Open Tender or a Selective Tender due to such things as life threatening situations; occupational health and safety; security; loss of essential services; avoiding damage to assets or service delivery disruption; weather protection or comparable events (but not where the performance of works or services is simply running over time);
 - (ii) where, in response to an Open Tender or a Selective Tender, no tenders were submitted; no viable tenders were received which represented value for money; no tenders conformed to the essential requirements of the tender documentation; or no tender participants satisfied the conditions for participation;
 - (iii) where only a single or limited number of tender participants could perform the works or services due to intellectual property rights or an absence of competition in a technical area;
 - (iv) where there are interface issues with existing equipment which necessitate the engagement of the original supplier;
 - (v) where the performance of additional works or services are an extension of works or services not included in the existing services but are within the objectives of the original tender documentation; or
 - (vi) where the works or services relate to leased premises or third party property where the supplier must be approved by the lessor or a third party or the costs are to be.

It should also be noted that where an Agency proposes to adopt a Limited Tender on the basis of special circumstances it is essential for the Agency, among other things, to document the nature of the special circumstances and to ensure that the Accountable Officer or the Responsible Minister of the Agency approves the use of the Limited Tender and the proposed approach to conducting the Limited Tender.

Agencies must provide potential tender participants with appropriate notice of the upcoming tender (**Tender Notice**) and must also ensure tender participants are allowed a reasonable time to respond to a tender following the notice. In determining a reasonable time, the Directions set out several factors for Agencies to consider, including the nature and complexity of the works or services; the tender strategy; the requirement for, and time required, to undertake site visits or other investigations; and the complexity of the tender documentation.

The Guidance states that 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 Agencies contact details; the number and format required for submission; and details of the tender submission location and timing.

The Instructions set out what the Tender Documentation must contain and most of the requirements will come as no surprise including, for example, details of the project objectives; appropriate details of the works or services; the tender closing date and time; details of place and process for lodgement etc.

Agencies need to note, however, that the Tender Documentation must include details of the evaluation criteria and identify any mandatory criteria to apply. In addition, Agencies may (but are not required to) provide participants with guidance about the evaluation criteria to encourage responsive tenders; and indicate the relative importance or weighting of the evaluation criteria.

Agencies must include mandatory evaluation criteria based on value for money and criteria to enable consideration of the tender participant's past performance in delivering works or services for Victorian government, other governments or non-governmental organisations. Depending on the value of the works or services, mandatory criteria also include compliance with occupational health and safety and industrial relations criteria set out in various attachments to the Instructions.

Information is also required to be included about relevant government policies that apply to the procurement such as the Victorian Industry Participation Policy.

In addition, when issuing a tender for works or services, the Agency must include an unamended form of contract approved by the Secretary for use (**Victorian Public Construction Contract**) except to the extent that amendments are required to comply with law or policy or as permitted by the Instructions.

At the conclusion of the tender process, Agencies must inform all tender participants of the outcome and offer a debrief. The debrief should cover such things as the reason(s) the response was not successful; the quality of the tender participant's response against the selection criteria, pre-qualification criteria and what the participant could do to improve future responses.

Agencies must also establish processes to respond to complaints raised by tender participants (and potential participants) about the procurement.

Form of contract to be used

Agencies are required to use the approved forms of Victorian Public Construction Contracts except where an alternate contract is permitted. The following contracts have been approved for use by all Agencies as Victorian Public Construction Contracts:

(a) For minor works:

- (i) Victorian Public Sector General Conditions of Contract for Minor Works (VPS MWC August 2018);
- (ii) AS 4305-1996 Minor Works Contract; and
- (iii) RAI A Minor Works Contract MWC-2 1994.

(b) For major works:

- (i) AS 2124-1992 (Construct Only) used with Victorian Public Sector – Annexure Part B Special Conditions of Contract; and
- (ii) AS 4300-1995 (Design and Construct) used with Victorian Public Sector – Annexure Part B Special Conditions of Contract.

(c) For construction services:

- (i) Victorian Public Sector Agreement for Provision of Consultancy Services (Short form) related to Construction June 2018;
- (ii) Victorian Public Sector Agreement for Provision of Consultancy Services (Long form) related to Construction June 2018;
- (iii) AS 4122 General Conditions of Contract for Engagement of Consultants.

An Agency is permitted to amend the terms of a Victorian Public Construction Contract in limited circumstances. Agencies have the discretion to agree non-material contract departures during tender negotiations or to non-material

contract amendments after a contract is signed. A material contract departure can only be accepted after receiving approval from the Secretary of the Department of Treasury and Finance or delegate of the Secretary. A material contract departure is a departure that following an assessment of the value, complexity and risk of the Works or Construction Services, may substantially impact the manner in which public construction procurement is conducted by other Agencies.

Further, Agencies are also only permitted to use an alternative form of contract in limited circumstances. First, where the approved contracts are inappropriate for the type of works being procured. For example, where the proposed delivery model is an alliance or public private partnership. Second, where the approved 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. Third, where the works or services relate to leased premises or third party property where the form of contract is required to be approved by the lessor or the third party.

It should also be noted that some Agencies have had specific contracts approved as Victorian Public Construction Contract for their use. Those Agencies include:

- (a) Department of Health and Human Services;
- (b) Development Victoria;
- (c) Office of the Co-ordinator General;
- (d) VicRoads; and
- (e) Victorian Schools Building Authority.

Contractual terms and conditions

The Directions and Instructions require that contracts for Public Construction Procurement address legislative requirements, policy requirements and also contain specific clauses.

In relation to legislative requirements, the contract must include provisions which:

- (a) allow the Victorian Auditor-General to conduct audits under the *Audit Act 1994* (Vic);
- (b) are consistent with the *Building and Construction Industry Security of Payment Act 2002* (Vic);
- (c) comply with the *Privacy and Data Protection Act 2014* (Vic) and Information Privacy Principles and Codes of Practice; and
- (d) allow disclosure in accordance with the *Freedom of Information Act 1982* (Vic).

In relation to policy requirements, the contract must include provisions which comply with, among others:

- (a) Partnerships Victoria Requirements (where undertaking PPPs);
- (b) Victorian Alliancing Policy (where undertaking alliance or other collaborative forms of contracting);
- (c) Victorian Government's Fair Payments Policy (where the total value does not exceed \$3M);
- (d) Protective Data Security Standards in respect of data held, use, managed, disclosed or transferred by the contractor on behalf of the Agency;
- (e) Whole of Victorian Government Intellectual Property Policy supported by the Intellectual Property Guidelines;
- (f) DataVic Policy supported by DataVic Access Policy Guidelines;
- (g) Local Jobs First – Victorian Industry Participation Policy;
- (h) Major Projects Skills Guarantee;
- (i) Victorian Industry Participation Policy (VIPPP); and
- (j) Victoria's Social Procurement Framework (from 1 September 2018) which requires social and sustainable procurement outcomes (particularly during the procurement planning phase) using a scalable approach based on expenditure.

In relation to specific contract clauses:

- (a) where the contract contains a termination for convenience clause, the clause must contain provisions which require the contractor to cease work within the time required by the Agency; demobilise its equipment and personnel from the site; secure the site and the works performed to date; and mitigate its costs. Further, except in exceptional

circumstances, the clause must exclude from the contractor's entitlements future profits on works or services not yet performed and compensation for economic or consequential loss;

- (b) concerning subcontracting, require statutory declarations from contractors stating that payments have been made to subcontractors in accordance with a prescribed form of statutory declaration;
- (c) concerning contractor's liability caps and exclusions, the contractor's liability must not be excluded or limited for:
 - (i) third party claims against the Agency in respect of personal injury, death, loss or damage to any property;
 - (ii) wilful misconduct, wilful default, wilful neglect, gross negligence, fraud or criminal acts or omissions of the contractor, its employees and agents;
 - (iii) liability which cannot be excluded at law; and
 - (iv) abandonment of work under the contract by the contractor.

A new shared reporting regime

Agencies must assess how suppliers perform using a template nominated by the Secretary for suppliers of works where the value of the relevant contract is \$500,000 (inclusive of GST) or higher or for suppliers of services where the value of the relevant contract is \$200,000 (inclusive of GST) or higher.

Assessments of the performance of suppliers of works must take place:

- (a) every six calendar months from the date of possession of the site until practical completion is achieved where the expected duration of engagement is more than 12 months;
- (b) within 30 days of the date of practical completion;
- (c) within 30 days after the end of the defects liability period; and
- (d) at any time when a significant issue affecting the supplier's performance arises.

Assessments of the performance of suppliers of services must take place:

- (a) every six calendar months where the expected duration of engagement is more than 12 months;
- (b) within 30 days of the end of the contract;
- (c) for designers of buildings or infrastructure - within 30 days of the later of the final design or working drawings and related documents such as specifications are submitted;
- (d) for suppliers whose services affect the delivery of buildings and infrastructure within 30 days of the date of practical completion and within 30 days after the end of the defects liability period; and
- (e) at any time when a significant issue affecting the supplier's performance arises.

Transparency and disclosure of Contracts

Within 60 days after the award of the contract, Agencies must publish on the website of system nominated by the Secretary, the key details of contracts for works or services with a total estimated value equal to or exceeding \$100,000 (inclusive of GST) and full contracting information for contracts for works or services with an estimated value exceeding \$10M (inclusive of GST).

Comment

Consistency of process when the government contracts with the construction industry is clearly an admirable goal. So too are the guiding principles of value for money and accountability when using State resources in procurement. The approach to contracting in the Directions and Instructions, however, appears to walk a tightrope between competing masters of uniformity of approach to contract conditions yet allowing a degree of flexibility to make amendments to those conditions. The authors of the Directions and Instructions recognise that one size does not fit all and while allocation of the identified risks in the Victorian Public Construction Contracts is one matter, other issues and risks depending on the nature of the procurement and location of the site will arise which will need to be addressed by the Agencies, presumably, on a case by case basis.