# Fact-sheet - Summary of key changes in the Ministerial Directions for Public Construction

**Effective date 1 July 2018**

## Introduction

The format of the Ministerial Directions is a tiered structure of mandatory directions and instructions, supported by non-mandatory guidance.

The [**Ministerial Directions and Instructions**](https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement) replace the current:

* Ministerial Direction No 1 – Tendering provisions for public construction,
* Ministerial Direction No 2 – Contractual provisions for public construction; and
* Ministerial Direction No 4 – Construction Requirements for a Community Fire Refuge[[1]](#footnote-1).

The Guides to the former Ministerial Directions are replaced by mandatory **Instructions**, issued by the Secretary of the Department of Treasury and Finance, and non-mandatory **Guidance,** issued by the Department of Treasury and Finance.

The [Guidance for Public Construction](https://www.dtf.vic.gov.au/practitioners-toolkit/practitioners-toolkit-guidance-public-construction-procurement) is a new feature to enhance support for the framework by assisting Agencies to consistently understand and interpret the requirements of the Ministerial Directions and Instructions.

The review of the Ministerial Directions was driven by the implementation of the Government’s endorsed reforms to improve the efficiency of Public Construction Procurement, which are set out in [Reforming Public Construction](http://www.dtf.vic.gov.au/Infrastructure-Delivery/Reforming-public-construction). The review of the Ministerial Directions also presented an opportunity to modernise the Ministerial Directions to ensure better alignment with contemporary procurement practice and governance arrangements in Victoria.

The revised framework has been developed with the support of the Construction Procurement Reform Advisory Panel, an inter-agency panel established by the Government to advise on the implementation of the reforms.

## About this document

This Fact sheet sets out a summary of key changes to the Ministerial Directions. It is intended to be read alongside the [Ministerial Directions and Instructions](https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement) to explain the reasons for the revised Ministerial Directions. Certain provisions of the Directions are subject to transition provisions as described in the [Fact sheet – Transition provisions for introduction of revised Ministerial Directions for Public Construction](https://www.dtf.vic.gov.au/practitioners-toolkit-fact-sheets-public-construction-procurement).

## 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](mailto:construction.procurement@dtf.vic.gov.au?subject=Support%20on%20Draft%20Revised%20Ministerial%20Directions).

# Direction 1 – Purpose and application

## Summary

Direction 1 sets out the purpose and application of the Ministerial Directions and the high level principles that apply to public construction procurement.

The Direction sets out the Agencies that must apply the Ministerial Directions, the types of procurement to which the Ministerial Directions apply, and the process for seeking an exemption.

## Key substantive changes

### Direction 1.2 - Principles

Specific principles that must be applied when undertaking public construction procurement are set out. These principles underpin the requirements in the Ministerial Directions and Instructions and should be referenced by Agencies when interpreting what they need to do to comply.

The principles also inform decisions on whether exemptions will be granted.

The introduction of principles is an important new element and enables long overdue alignment with the procurement principles in the **Financial Management Act Standing Directions of the Minister for Finance 2016** and the principles in the Victorian Government Purchasing Board policies.

### Direction 1.3 - Application of the Directions and Instructions to Agencies

The Ministerial Directions clearly identify the Agencies (approximately 300) that must comply, addressing the current ambiguity in the former Ministerial Directions which refer only to Departments and public bodies.

The scope is the same as the Agencies covered by the **Financial Management Act Standing Directions of the Minister for Finance 2016**, which are listed in the fact sheet: [Is your agency subject to the Standing Directions of the Minister for Finance](http://www.dtf.vic.gov.au/files/953ef0bd-0ab4-4835-af21-a78300bc51ac/Is-your-agency-subject-to-the-Standing-Directions-of-the-Minister-for-Finance.pdf). This coverage also aligns with the accountability mechanism, which is through the attestation given under the [Financial Management Act Standing Directions of the Minister for Finance 2016](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-minister-finance-2016).

Agencies that are excluded from the direct application of the Ministerial Directions are subject to appropriate requirements put in place by their portfolio department. This allows for appropriate flexibility and scalability of the requirements.

In addition, the procurement model to which the Ministerial Directions apply has also been clarified through definitions of Works and Construction Services. Additional guidance on what constitutes Works and Construction Services is presented in [Application of the Directions and Instructions (Guidance 1.3a)](https://www.dtf.vic.gov.au/practitioners-toolkit/practitioners-toolkit-guidance-public-construction-procurement). Guidance on what is public construction is presented in [Defining public construction (Guidance 1.3b)](https://www.dtf.vic.gov.au/practitioners-toolkit/practitioners-toolkit-guidance-public-construction-procurement).

### Direction 1.4 – Exemptions

A key new feature to enhance the flexibility and support devolved accountability of the Ministerial Directions is the introduction of a new general power of the Minister for Finance and the Secretary of the Department of Treasury and Finance to grant exemptions from the Ministerial Directions and Instructions (respectively) to Agencies, or a class of Agencies, on a standing basis. The way in which the requirements are allocated between the Ministerial Directions and Instructions means that most exemptions will be sought from the Secretary of the Department of Treasury and Finance.

Agencies are able to apply to be exempted from a requirement, such as to request alternative thresholds to apply. This aims to balance the desire for greater flexibility for Agencies, while maintaining general consistency in the approach to competition and limiting the burden of tendering. The determination of an exemption will be based on a rigorous assessment.

# Direction 2 – International Agreements

## Summary

The Ministerial Directions retain the existing approach that requirements for government procurement in International Agreements, such as the Australia-United States Free Trade Agreement, prevail over the requirements of the directions.

## Key substantive changes

Rather than referring Agencies to the International Agreements and risking inconsistencies in interpretation by practitioners, the Instructions state which procurements are covered by International Agreements and set out the additional requirements that must be followed in covered procurements.

# Direction 3 – Tendering principles

## Summary

The tendering principles in the Ministerial Directions are based on the existing requirements. Additional requirements have been included to address and reinforce a number of the Government's endorsed reform recommendations to improve the efficiency of tender processes. In particular, preparation and planning, clear notice of upcoming procurement, and using appropriate tender open times and documentation requirements.

Requirements such as the mandatory evaluation criteria for occupational health and safety and industrial relations are retained.

## Key substantive changes

### Direction 3.1 – Tender preparation and planning

The introduction of preparation and planning requirements is intended to build a continuous improvement approach into procurement of public construction. The requirements are intended to be outcome-focused and scalable.

While there are key preparation activities that are mandatory, the Ministerial Directions are not prescriptive for things like a particular form of 'tender plan', for example, but require that key dates and time periods in the tender program are identified. There is flexibility and scope for Agencies to determine an appropriate level of preparation based on the value or complexity of the procurement, and to allow consistency with existing Agency processes.

The elements of the planning and preparation process are not new. They are consistent with existing Government policies and practice, in particular the [Investment Lifecycle Guidelines](https://www.dtf.vic.gov.au/infrastructure-investment/investment-lifecycle-and-high-value-high-risk-guidelines). Where relevant, the Directions reflect the policy position in the Investment Lifecycle Guidelines.

The Guidance further supports a scalable approach to procurement preparation and planning. The Guidance emphasises that the expectations for a simple procurement are different to those for a complex procurement.

### Direction 3.2 – Competition and contestability

The presentation of the thresholds in the Ministerial Directions has been updated to better align to the approach in International Agreements. Agencies should note that clarifications have been made to the Special Circumstances when a Limited Tender is allowed. This addresses previous areas of confusion.

The Ministerial Direction includes a requirement for appropriate documentation and approval of Special Circumstances, by the Accountable Officer. This may be delegated in accordance with the Direction 10.2. However, Agencies should be aware that the Accountable Officer is not able to delegate the existence of 'exceptional circumstances' in exemption as noted in Instruction 3.2.1(c)(iii).

### Direction 3.4 – Tender notice requirements

A number of the Government's endorsed reforms emphasised the need to improve the type and nature of information given to the market, and to allow appropriate tender open time periods.

Notices must be published on a common website, currently the [Victorian Government tenders system TendersVIC](https://www.tenders.vic.gov.au/tenders/index.do). This is to enable suppliers to access a single point for information about all government procurement opportunities. The notices required are:

* Forward notice for all open and Selective Tenders (Direction 5.1), which must be published an appropriate period in advance. Guidance gives examples of appropriate periods for different types of procurement from simple to complex.
* Tender Notice, identifying where tender documents can be found.

# Direction 4 – Probity

## Summary

Probity principles listed in the Ministerial Directions reflect current public sector practices and expectations. Agencies must have appropriate systems in place to ensure probity for all public construction procurement and processes to ensure that procurement is conducted in a manner consistent with the probity principles.

## Key substantive changes

Direction 4.1 outlines principles for establishing and maintaining probity in procurement. The principles reflect a common sense approach to managing probity and current public sector practices and expectations.

Each participant in a tender process must make a written commitment stating that they will conduct themselves fairly and honestly and will not engage in collusive tendering or any other anti-competitive practices. This provision in the Ministerial Directions confirms current public sector practice.

Direction 4.2 requires Agencies to have appropriate systems in place to ensure probity for all public construction procurement. A probity plan must be prepared for:

* high value procurements (likely to be of a value in excess of $10 million (inclusive of GST)), or
* complex and/or otherwise high risk procurements.

For all other procurements, Agencies must have appropriate systems and processes in place to manage probity to ensure they are able to conduct the procurement in a manner consistent with the principles in Direction 4.1.

# Direction 5 – Openness in Public Construction Procurement

## Summary

The Ministerial Directions require greater transparency of public construction procurement activity through publication of notices and disclosure of procurement details on a common website, currently the [Contracts module on the Victorian Government tenders system TendersVIC](https://www.tenders.vic.gov.au/tenders/contract/list.do?action=contract-view). These requirements cover:

* 1. Forward notices of intended procurements for all open and Selective tenders, to enable suppliers to have visibility of the upcoming pipeline of government procurements;
  2. Tender notices for Selective and Limited Tenders, as well as open tenders.
  3. Disclosure of contract details.

## Key substantive changes

Direction 5.1 introduces the requirement to publish a notice of forthcoming procurements to give the market an indication of the upcoming opportunities.

The current requirement for notices of tenders has been extended to include invited as well as open tenders (Direction 3.4).

The publication of these notices support better market awareness and improve the ability to present a forward pipeline of upcoming opportunities.

The requirement for disclosure of contract details has been retained and is reinforced. Direction 5.2 requires the disclosure of key details of contracts with a value greater than $100,000 (inclusive of GST) regardless of the type of tender process. In addition to the requirement to disclose key details of contracts, Direction 5.2 clarifies that where [Financial Reporting Directive 12B Disclosure of major contracts](http://www.dtf.vic.gov.au/files/bf03cb28-29e9-40d9-9ec1-a63200b44f9f/FRD-12B-Disclosure-of-major-contracts.docx) applies, full disclosure of contracts for works and construction services in excess of $10 million (inclusive of GST) is required.

Collectively, the notices and disclosure allow the government to better understand and analyse procurement trends and allow the market to better prioritise its resources.

# Direction 6 – Pre-qualification and panel arrangements

## Summary

Pre-qualification and panel arrangements in the Ministerial Directions are based on the existing requirements. A mechanism for the establishment and approval of registers of pre-qualified suppliers is described, as well as processes to establish panels of suppliers.

## Key substantive changes

The requirements for prequalification remain relatively unchanged from the existing Ministerial Directions. Most of the improvements that respond to the Government's endorsed reforms will be operational changes to the Construction Supplier Register. These include the introduction of additional subcategories and performance reporting.

Key changes to support these operational changes include:

* highlighting that selective tenders may be open to a selected group within a category (minimum 3), or all suppliers in a category, to promote a more open approach (Direction 3.2); and
* forward notice requirements (Direction 5.1) giving suppliers an incentive to ensure registration in the relevant pre-qualification scheme and category.

# Direction 7 – Contracting requirements

## Summary

The Ministerial Directions retain and reinforce the use of mandatory standard forms of construction contract, referred to collectively as the Victorian Public Construction Contracts. Long standing principles that require Agencies to use the form of contract appropriate for the procurement model, consistent with any government policy applicable to the procurement and to use of forms of contract known to the relevant segment of the market have been retained.

The most commonly used Victorian Public Construction Contracts are supported by Practice Notes 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.

## Key substantive changes

### Direction 7.1 – Contracting requirements

The Ministerial Directions retain the use of mandatory standard forms of construction contract, referred to collectively as the Victorian Public Construction Contracts.

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. For example, an Agency decision to accept a tenderer’s requested contract departure that would remove or drastically reduce a core insurance requirement.

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.

### Direction 7.2 – Contractual terms and conditions

The Direction clarifies that contractual terms and conditions must address certain provisions, and must ensure compliance with legislative and policy requirements. The list of applicable policies and legislation is documented.

Principles of contracting have been identified where a common approach to issues that affect government is required. For example, reflecting the Victorian Auditor General's follow the dollar powers in contracts. Each Agency is required to adopt consistent forms of contract for similar procurements consistent with the contracting principles.

The concept of non-standard commercial arrangements is introduced. A non-standard commercial arrangement 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. For example, an Agency decision:

* to accept a unique industrial arrangement or condition that could create significant funding implications for government and potentially set industry expectations that compromise the State’s bargaining position in the market; or
* to enter into a contract that does not comply with a mandatory Government policy requirement.

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.

# Direction 8 – Improving performance and continuous improvement

## Summary

The Ministerial Directions retain the current requirements to debrief tender participants and to undertake supplier performance reporting.

The Secretary of the Department of Treasury and Finance may establish an advisory body to support the Minister for Finance and the Secretary in administering the Ministerial Directions and Instructions.

## Key substantive changes

### Direction 8.2 – Supplier performance and shared reporting regime

Performance reporting is a vital element in improving informed decision making for the use of pre-qualification registers and promoting continuous improvement of construction procurement and delivery across government. Direction 8.2 retains the existing requirement to undertake supplier performance reporting.

Agencies must assess how suppliers perform using a the template nominated by the Secretary of the Department of Treasury and Finance when:

* for suppliers of Works - the value of the contract engaging the supplier is $500,000 (inclusive of GST) or higher, or
* for suppliers of Construction Services - the value of the contract engaging the supplier is $200,000 (inclusive of GST) or higher;

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

Completed performance reports must be submitted to the website or system nominated by the Secretary of the Department of Treasury and Finance at the times set out in Instructions 8.2.2 and 8.2.3.

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

### Direction 8.4 – Public Construction Procurement Committee

Key elements of the committee’s role include advising on the dollar value of thresholds, contracting principles and model contracts, and information about trends in complying with the Directions. The Ministerial Directions also require the composition of the committee to be reflective of the Agencies that need to comply with the Ministerial Directions. In practice, the Department of Treasury and Finance expects that all departments will be represented, along with key procuring agencies and representatives of classes of agencies that undertake significant volumes of construction procurement such as water authorities and health agencies.

# Direction 9 – Standards

## Summary

The Ministerial Directions retain the power to issue standards for public construction.

The former Ministerial Direction No 4 – Construction Requirements for a Community Fire Refuge remains in operation and is presented as Instruction 9.1.1 Standards for constructing a community fire refuge.

# Direction 10 – Accountability

## Summary

The Ministerial Directions are consistent with the devolved accountability framework in the [Financial Management Act Standing Directions of the Minister for Finance 2016](https://www.dtf.vic.gov.au/financial-management-government/standing-directions-minister-finance-2016). Compliance with the Ministerial Directions is part of affected Agencies' attestation under the **Financial Management Act Standing Directions of the Minister for Finance 2016**.

The role and responsibility of the Accountable Officer is set out (Direction 10.1), along with clarification around the responsibilities of portfolio departments for their portfolio agencies (Direction 1.3).

## Key substantive changes

A devolved accountability framework, supported by attestation is introduced.

The accountability mechanism is the existing mechanism used for the **Financial Management Act Standing Directions of the Minister for Finance 2016** attestation. The roles and responsibilities of the Accountable Officer, Responsible Body and audit requirements related to the attestation are those set out in the **Financial Management Act Standing Directions of the Minister for Finance 2016**. This avoids duplication, and improves efficiency as these requirements and processes are already familiar to Agencies.

The accountability mechanism identifies:

* for applicable Agencies - who is accountable for ensuring compliance; and
* in the case of portfolio departments with responsibilities for portfolio agencies, whether or not the Ministerial Directions directly apply to the portfolio agency.

The Accountable Officer of an Agency bound by the Ministerial Directions has a number of responsibilities set out in Direction 10. These responsibilities are focused on 'systems and controls', to ensure the Agency adheres to the requirements in the Ministerial Directions when undertaking Public Construction Procurement, rather than direct responsibility for ensuring that the specific requirements in the Ministerial Directions are applied for each procurement undertaken by the Agency. However, it is important to note that the responsibilities include assurance that these systems and controls have achieved the objective. This requires the Accountable Officer to monitor effectiveness of the systems and processes established for construction procurement.

Accountable Officers of 'Portfolio Departments' have additional responsibilities for portfolio agencies. These responsibilities include:

* providing support to Agencies in achieving compliance, and
* for Agencies excluded from the Ministerial Directions (refer Direction 1.3.3), the establishment of appropriate construction procurement requirements for the excluded entities, including appropriate accountability and monitoring requirements.

1. The requirements of the former Ministerial Direction No 4 – Construction Requirements for a Community Fire Refuge continue in operation, presented as Instruction 9.1.1. [↑](#footnote-ref-1)