# Fact sheet - Transition provisions for the introduction of the revised Ministerial Directions for Public Construction Procurement

**Effective date 4 October 2018**

## Commencement date of the Directions

The [Ministerial Directions for Public Construction](https://www.dtf.vic.gov.au/public-construction-policy-and-resources/ministerial-directions-and-instructions-public-construction-procurement) are effective from 1 July 2018, subject to the transition provisions described in this Fact sheet.

## Transition provisions

Transition provisions apply to certain Ministerial Directions for Public Construction Procurement:

* operation of Registers of prequalified suppliers (Direction / Instruction 6.1),
* contracting requirements (Direction / Instruction 7.1), and
* attestation (Direction /Instruction 10.1).

## About this Fact sheet

This Fact sheet sets out the transition provisions applying to the Ministerial Directions and Instructions. It sets out the substantive provision of the relevant Direction or Instruction and describes how the transition provisions modify their operation. The period within which the transition provisions apply is also described.

This fact sheet was updated on 4 October 2018 to record the extended date for submission of notices for the operation of Registers of prequalified suppliers (Direction / Instruction 6.1), and contracting requirements (Direction / Instruction 7.1) - the extended date is 31 December 2018.

## 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.

# Operation of Registers of prequalified suppliers

## Direction / Instruction 6.1

A Register is a register of prequalified suppliers established in accordance with these Directions.

Direction 6.1 requires that Agencies may only establish, operate and use a Register with the prior approval of the Secretary to the Department of Treasury and Finance and as set out in the Instructions.

Instruction 6.1 sets out:

* the grounds that the Secretary must consider when approving a Register,
* that the Secretary will publish the names of current approved whole-of-government Registers and agency-specific Registers, and
* the requirements for establishing a Register

Current approved whole-of-government Registers:

Construction Supplier Register (operated by the Department of Treasury and Finance)

Current approved agency-specific Registers:

VicRoads Prequalification and Registration Scheme

Places Victoria Register of Prequalified Contractors

## Transition provisions

### Rationale

To provide time for the Agency to make any adjustments to the Register, that has not been approved by the Secretary of the Department of Treasury and Finance, so that its establishment and operation meet the requirements of Instruction 6.1 and to seek the required approval.

### Transition provisions

An Agency that wishes to use a register that has not been approved by the Secretary of the Department of Treasury and Finance must notify the Department of Treasury and Finance by email construction.procurement@dtf.vic.gov.au of the existence of the Register by **31 December 2018**.

Registers will be reviewed to confirm that they are Registers and not some other arrangement (such as a panel or standing offer arrangement, which are not subject to the Secretary’s approval).

Registers notified by **31 December 2018** that are confirmed to be Registers will be allowed to operate on a temporary basis until 30 June 2019. During this transition year the Department of Treasury and Finance will review the Register for compliance with Instruction 6.1. The Department will liaise with the Agency to raise any queries or request further information.

The Secretary to the Department of Treasury and Finance may decide to approve the Register on an ongoing basis under Instruction 6.1. Alternatively, the Department may advise the Agency that further action is needed to bring the Register into compliance for ongoing approval to be granted.

# Contracting requirements

## Direction / Instruction 7.1

Direction 7.1 requires that Agencies use approved forms of contract for their procurements. The approved contracts (called Victorian Public Construction Contracts) are listed at [Practitioners Toolkit – Standards Form Contracts](https://www.dtf.vic.gov.au/practitioners-toolkit/practitioners-toolkit-standard-form-contracts).

Instruction 7.1 sets out provisions to be followed when special circumstances of a project require that the approved forms of contract are not suitable for use. The transitional provisions outlined below are separate from the general provisions dealing with special conditions.

### Benefits of using standard contracts

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

Industry (and contract managers) prefer standard forms of contract because they are more likely to be familiar with the obligations that apply to both parties. This approach is more efficient and reduces the need for legal reviews. It is also likely to reduce the number of disputes arising in relation to unique contract terms.

### Overview of Victorian Public Construction Contracts

The suite of Victorian Public Construction Contracts currently provides standard contracts for the most frequently used procurement methods. Additional forms of contract addressing other procurement methods may be added over time.

The most commonly used contracts have been recently updated and are supported by a suite of practice notes and a clause bank to address commonly faced issues.

Contracts for ongoing use that have recently been approved by the Department of Treasury and Finance under the former Ministerial Direction No 2 Contracting Provisions for Public Construction have been added to the suite of Victorian Public Construction Contracts. The Department will continue to work with the Agencies that drafted these contracts to ensure that they remain current and relevant.

## Transition provisions

Agencies that have developed precedent contracts that have not been approved by the Department of Treasury and Finance may continue to use these contracts until notified by the Department of Treasury and Finance in accordance with the transitional process set out below.

### Transitional requirements for precedent contracts

An Agency that wishes to use a precedent contract under this transitional provision must:

* review the contract for compliance with all policy and legislative requirements;
* either publish a copy of the contract on the Agency’s website, or make a copy available for inspection on request (and advise contact details for requests on the Agency’s website); and
* By no later than **31 December** 2018, notify the Department of Treasury and Finance by email to construction.procurement@dtf.vic.gov.au to advise that the contract is being used under this transition provision, along with the web link to the contract (if published) or a copy of the contract attached (if not published).

### Information to be submitted in support of ongoing use of a precedent contract

The Agency must submit:

* a copy of the contract as a blank template in MS Word or equivalent editable format; and
* a description of the commercial positions typically used to complete variable items and schedules.

The Agency will be required to submit evidence to allow an assessment to be made on:

* the origin and subsequent development of the contract;
* whether the contract addresses relevant law and policy relating to Victorian Public Construction Procurement;
* whether the contract presents commercial positions similar to that used in related Victorian Public Construction Contracts;
* the frequency of use of the contract for a class of procurement, or a segment of suppliers; and
* unique provisions relevant to the Agency, the class of procurement, or the category of suppliers usually engaged under the contract.

### Guiding considerations for contract reviews

Contracts used under the transitional process will be reviewed by the Department of Treasury and Finance. In undertaking these reviews, the Department will consider a range of criteria, including whether the contract:

* is consistent with related Victorian Public Construction Contracts, or could be made consistent without substantial redrafting;
* is based on, or consistent with, other forms of contract commonly used in the Australian construction industry;
* is consistent with current law and policy relating to Victorian Public Construction Procurement, or could be made consistent without substantial redrafting;
* is consistently and frequently used by that Agency, such that existing suppliers to that Agency are comfortable with the contract; and
* as a whole, or certain clauses, schedules or annexures of the contract, fills a legitimate gap not adequately addressed by the Victorian Public Construction Contracts.

The Department will liaise with the relevant Agency throughout the course of a contract review. At the end of the review, the Department will take one of the following courses of action:

* add the contract to the suite of Victorian Public Construction Contracts (with or without amendment); or
* retire the contract from use following discussions with the Agency.

The Agency will be notified of the outcome.

If the contract is retired from use, the Department may select clauses from the contract for addition to the clause bank or insertion into existing Victorian Public Construction Contracts.

Once a contract is retired from use it no longer complies with the Directions and therefore cannot be used for new procurements.

# Attestation

## Direction / Instruction 10.1

Direction 10.1 requires that that the Accountable Officer of each Agency must, with respect to their Agency, establish appropriate and effective governance frameworks. One element within this accountability is attestation of compliance with the Directions.

The Directions for Public Construction Procurement are reinforced by the Standing Directions of the Minister for Finance 2016, which set out a number of relevant matters including the requirement to demonstrate compliance with the Directions for Public Construction Procurement. This takes the form of a public attestation by the Accountable Officer (or board of a public sector agency) published in the Agency’s annual report.

Standing Direction 4.2.4 Public Construction Accountability requires the Agency to apply the Ministerial Directions for Public Construction Procurement.

The organisation’s audit committee, or an alternative review mechanism when there is no audit committee, must be satisfied with the view expressed in the attestation before finalising the attestation.

The Standing Directions of the Minister for Finance 2016 also require Agencies to assess any compliance deficiencies and report material compliance deficiencies as part of the attestation. Guidance - Material Compliance Deficiencies explains key terms and provides potential examples of compliance deficiencies.

## Transition provisions

### Rationale

To provide a period of time when Agencies can adjust systems and processes in response to the revised Ministerial Directions.

### Transition provisions

Attestation of compliance normally applies to the 12 month period covered by the annual report.

For the 2018-19 year attestation against Standing Direction 4.2.4 applies as at 30 June 2019 (that is attestation is required for one day only – 30 June 2019). This provides Agencies an extended period in which to adapt systems and processes to meet the requirements of the Directions. For clarity, attestation against all other Standing Directions applies for the full 12 month period of
2018-19.

From the 2019-20 year onwards attestation for Public Construction Procurement applies for the 12 month period covered by the annual report.