

Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2023 (No 1)

Notifiable instrument NI2023–24

made under the

Government Procurement Regulation 2007, s13 (Procurement procedure)

1 Name of instrument

This instrument is the *Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2023 (No 1)*.

2 Commencement

This instrument commences on 3 April 2023.

3 Application

- (1) This instrument applies to a procurement undertaken by a Territory Entity:
 - a) to which Part 2B of the Act applies; and
 - b) that has a total estimated value of \$200 000 or more.
- (2) For the avoidance of doubt, this includes a procurement to establish, or add to an existing, standing offer arrangement.
- (3) This instrument does not apply to:
 - a) procurements that have been advertised to suppliers before 3 April 2023; and
 - b) standing offer contracts as defined in the Regulation; and
 - c) procurements where an exemption from the Secure Local Jobs Code has been granted under section 22H of the Act.

4 Government Procurement Direction

I direct that in undertaking a procurement to which section 3 applies, a Territory Entity must comply with the *Ethical Treatment of Workers Evaluation*, as set out in the schedule to this instrument.

5 Revocation

This instrument revokes Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2021 [NI2021-730].

Chris Steel
Special Minister of State
17 January 2023

Schedule

ETHICAL TREATMENT OF WORKERS EVALUATION



ACT
Government



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MINISTERIAL MESSAGE

The ACT Government is committed to strengthening our procurement practices by ensuring we are awarding contracts to businesses whose standards align with the Territory's. This will ensure our continued support for sustainable, secure and safe jobs for all Canberrans. We want to create fairer procurement processes for model employers and hold accountable any businesses not meeting their industrial and legal obligations.

The *Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2021* incorporates an assessment of tenderer practices as an employer into our procurement processes. It will support tenderers to maintain their compliance with the Secure Local Jobs Code and workplace laws. The Direction will ensure ACT Government spending influences positive business behaviour, and encourage businesses tendering for work to meet the high labour standards the Canberra community expects.

Incorporating the Fair and Safe Employment Evaluation Criteria into our procurement processes will strengthen our ability to achieve genuine value for money, support a vibrant and sustainable local economy and foster a safe and well-paid workforce to underpin the ACT Government's economic and fiscal recovery efforts.

This process encourages decision-makers to think about the behaviours we want to encourage and reward from businesses, and how we can ensure that our procurements are consistent with ACT Government and community values.



Chris Steel MLA

Special Minister of State

Mick Gentleman MLA

Minister for Industrial Relations and Workplace Safety

OVERVIEW

Application of the Ethical Treatment of Workers Evaluation is an ACT Government requirement given effect to by the *Government Procurement (Ethical Treatment of Workers Evaluation) Direction 2021* (Direction).

Territory entities subject to the Direction will:

- > ensure relevant officers understand and comply with the Direction when undertaking a procurement that requires its application.
- > make a decision on whether a Tender may proceed for consideration in the procurement process following an evaluation under the fair and safe employment evaluation criteria (Evaluation Criteria).
- > notify the decision to the Secure Local Jobs Code Branch as outlined in this schedule.
- > seek guidance from Secure Local Jobs Code Branch and Procurement ACT on applying the Ethical Treatment of Workers Evaluation, as required.

OBJECTIVES

The ACT Government has a clear objective to use our purchasing power to promote the highest standards of safe and ethical workplace behaviour. Ensuring public confidence in the use of taxpayer money is a central aim of the ACT Government's procurement framework and the pursuit of value for money. Safe and ethical behaviour by employers is central to each procurement alongside price and technical requirements. The Ethical Treatment of Workers Evaluation requires ACT Government staff involved in a procurement to consider fair and safe working conditions as a central value in their procurement decisions.

The ACT Government recognises that procuring from Tenderers whose business practices do not align with the Territory's Procurement Values is not consistent with the pursuit of value for money under the *Government Procurement Act 2001*.

The objective of this evaluation is to ensure that the ACT Government only contracts with Tenderers who demonstrate behaviour and business practices aligned to the [Fair and Safe Conditions for Workers Procurement Value](#) and remain compliant with their obligations under the [Secure Local Jobs Code](#).

This process provides a mechanism for assessing ethical treatment of workers in the context of specific Tenders and operates in addition to Secure Local Jobs Code certification.

ETHICAL TREATMENT OF WORKERS EVALUATION

The Secure Local Jobs Code Branch will consider each Tender against the Evaluation Criteria in Table 1.

Table 1: Fair and Safe Employment Evaluation Criteria

Fair and Safe Employment Evaluation Criteria	
Secure Local Jobs Code compliance	Reputational risk
<p>Tenderer’s ongoing compliance with their Secure Local Jobs Code obligations including:</p> <ul style="list-style-type: none"> > Tenderer has submitted a completed and compliant Labour Relations Training and Workplace Equity Plan for the procurement > Tenderer has complied with and met Labour Relations Training and Workplace Equity Plan reporting obligations for any applicable contracts in the preceding 12 months > Tenderer has maintained compliance with prescribed legislation under the Secure local Jobs Code (see Appendix A). <p>Note: To evaluate Secure Local Jobs Code compliance, the Secure Local Jobs Code Branch will review any convictions, civil penalties or, in the absence of conviction, evidence that the Tenderer has engaged in non-complying conduct in connection with prescribed legislation in the preceding five years.</p>	<p>Whether the Tenderer has demonstrated any actions or omissions that would be likely to have a material adverse effect on:</p> <ul style="list-style-type: none"> > The reputation of the Territory or a relevant Territory Entity in relation to its status as a model employer, that only contracts with other employers who show model behaviour towards their employees. > The risk to the Territory Entity posed by procuring from an unethical Tenderer. > The public interest, or public confidence in the Territory and/or its procurement framework. <p>Note: To evaluate reputational risk, the Secure Local Jobs Code Branch may use any information that is available to Government. This may include:</p> <ul style="list-style-type: none"> > media reports > alleged breaches of relevant legislation for which there is some evidence, but investigations are currently underway, including complaints or information received by the Secure Local Jobs Code Registrar but which have not yet been the subject of formal action by the Secure Local Jobs Code Registrar > convictions, civil penalties, or any other legal action which falls outside the five-year timeframe but is relevant to assessing reputational risk (for example, where legal action is still ongoing in relation to events which occurred prior to the preceding five years) > enforcement notices or current investigations against any relevant legislation in addition to the prescribed legislation under the Secure Local Jobs Code (see Appendix A) or unethical acts by the Tenderer

In undertaking the evaluation, the Secure Local Jobs Branch must seek information from relevant sources and entities. This may include seeking comments from regulatory bodies such as the Work Health and Safety Commissioner about work safety matters, the relevant trade union in relation to employee matters and confirmation of consultation with employees on Labour Relations Training and Workplace Equity Plans, and ACT Government agencies about compliance with contractual terms.

Based on the assessment of a Tenderer against the Fair and Safe Employment Evaluation Criteria, the Secure Local Jobs Code Branch will recommend to the Delegate whether or not a Tenderer should remain in consideration in the procurement process.

The Delegate makes a decision based on the available evidence before them on whether a Tender may proceed for consideration in the procurement process.

A Delegate may decide that a Tenderer proceed for consideration in the procurement process despite a contrary recommendation from the Secure Local Jobs Branch only where:

- > the Tender is the only respondent to a procurement process; or
- > the procurement is for emergency works to critical services that have been disrupted; or
- > the procurement is to prevent an imminent danger to health and safety.

Where a Delegate decides to include a Tenderer despite a recommendation from the Secure Local Jobs Branch, the Delegate must:

- > consult with the Chief Executive of the Territory Entity;
- > provide reasons and evidence in support of including the Tenderer; and
- > record the decision in writing.

To remove any doubt, the Delegate is the ultimate decision maker for the procurement.

To assist the Secure Local Jobs Code Branch to perform its role, where a decision is different from the Secure Local Jobs Code Branch's recommendations, this must be notified to the Secure Local Jobs Code Branch within three business days of the decision being made along with the reasons for the decision.

While the consideration of the Fair and Safe Employment Evaluation Criteria may occur concurrently with the evaluation of any other evaluation criteria in a procurement, including the centralised assessment of Labour Relations Training and Workplace Plans by the Secure Local Jobs Code Branch, a Tenderer's performance against these criteria may result in a recommendation that they do not proceed further in the procurement process.

Inclusion of a Tenderer in one instance does not create a precedent for automatic inclusion in future procurements.

The Ethical Treatment of Workers Evaluation does not directly apply to subcontractors. Tenderers will be responsible for undertaking due diligence on their subcontractors to ensure they meet ACT Government ethical procurement standards. This requirement will be reflected in approach to market Documents and any contracts arising from a procurement.

TENDERER COMPLAINTS

Tenderers may lodge a complaint in accordance with the Supplier Complaints Management Procedure if there are concerns about the application of the Ethical Treatment of Workers Evaluation to a procurement.

REVIEW

Procurement ACT, with support from SLJC Branch, will conduct a comprehensive review of the Evaluation one year from implementation. This review will address the integration of the Ethical Treatment of Workers Evaluation into ACT Government procurements to date and provide recommendations for improvement. It will also consider options to expand its scope and/or criteria.

The Secure Local Jobs Code Branch will make available, on a quarterly basis, to the Special Minister of State and the Minister for Workplace Safety and Industrial Relations, the number of procurements, by each Territory entity, where a Tenderer remained in consideration in a procurement process, contrary to the recommendation by the Secure Local Jobs Code Branch as reported by Territory entity Delegates.

GLOSSARY

Term	Definition
Business Day	Any day that is not a Saturday, Sunday, or a Territory/national public holiday.
Delegate	A delegate nominated for the relevant procurement
Procurement Value	A value in the Charter of Procurement Values
Tender	A response submitted by a Tenderer to an Approach to Market
Tenderer	An entity (including a natural person) that may be engaged by a Territory Entity under a procurement
Territory Entity	Has the meaning given to it by the <i>Government Procurement Act 2001</i> (ACT) and refers to the Territory Entity undertaking the relevant procurement and required to comply with Directions under s13 of the <i>Government Procurement Regulation 2007</i>

APPENDIX A - SECURE LOCAL JOBS CODE PRESCRIBED LEGISLATION

Prescribed Legislation means all applicable Acts and subordinate instruments of the Commonwealth and the Territory, which deal with matters relating to industrial relations, employment and/or workplace safety obligations that apply to a Tenderer, including (as amended or replaced from time to time) but not limited to:

Fair Work Act 2009 (Cth)

Building and Construction Industry (Improving Productivity) Act 2016 (Cth)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)

Income Tax Assessment Act 1997 (Cth)

Independent Contractors Act 2006 (Cth)

Industry Research and Development Act 1986 (Cth)

Long Service Leave Act 1976 (ACT)

Long Service Leave (Portable Schemes) Act 2009 (ACT)

Migration Act 1958 (Cth)

Paid Parental Leave Act 2010 (Cth)

Payroll Tax Act 2011 (ACT)

Safety, Rehabilitation and Compensation Act 1988 (Cth)

Superannuation Guarantee (Administration) Act 1992 (Cth)

Superannuation Guarantee Charge Act 1992 (Cth)

Work Health and Safety Act 2011 (ACT)

Workers Compensation Act 1951 (ACT)

Workplace Gender Equality Act 2012 (Cth)

**Labour Hire Licensing Act 2020 (ACT)*

**Discrimination Act 1991 (ACT)*

**These two Acts are not listed in the examples of prescribed legislation in the Secure Local Jobs Code (Code), however the prescribed legislation list in the Code is caveated as non-exhaustive. Prescribed Legislation under the Code covers all Commonwealth and Territory Acts relating to industrial relations or workplace safety obligations. These additional Acts have been specifically included here for clarity*



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